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IN THE

Supreme Court of the United States

October Term 1963
No. 584

ROGER ARNEBERGH,

Petitioner,

vs.

JACOB ZEITLEN and PAUL FERGUSON,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

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Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California, entered in the above-entitled case on July 2, 1963.

Citations to Opinion Below.

The opinion and judgment of the Supreme Court of the State of California, R. 489, attached as Appendix A hereto, is reported in 59 A.C. 930 and 383 P. 2d 152.

Jurisdiction.

The judgment of the Supreme Court of the State of California was entered on July 2, 1963, R. 489, Appendix A. Rehearing was denied July 31, 1963, R. 500. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Question Presented.

Whether freedom of speech and the press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States as construed by the decisions of this Court, particularly in *Roth v. United States, Alberts v. California*; 354 U.S. 476, and the *per curiam* decisions in *Times Film Corp. v. Chicago*, 355 U.S. 35; *One, Inc. v. Olesen*, 355 U.S. 371, and *Sunshine Book Co. v. Summerfield*, 355 U.S. 372, limit state obscenity laws to the suppression of *hard-core pornography*.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States, and the provisions of Sections 311 and 311.2 of the Penal Code of the State of California, are set forth in Appendix B.

Statement.

Petitioner, the City Attorney of the City of Los Angeles, California, was defendant, and respondents were plaintiffs in an action brought in the Superior Court of the State of California for the County of Los Angeles. The complaint [R. 4] was for declaratory relief praying for a judgment declaring that the sale or offering for sale of the book *Tropic of Cancer* by Henry Miller was not violative of California Penal Code Section 311.2. A copy of the book was appended to the complaint and constitutes a part of the record certified by the court below. The prayer [R. 10] also sought an injunction, pending determination of the cause, restraining defendant and his representatives from prosecuting any bookseller in the City of Los Angeles for selling or offering for sale the book *Tropic of Cancer*.

Plaintiffs alleged in their complaint that defendant's prevention of the sale of the book would violate their rights to freedom of the press under the First and Fourteenth Amendments to the United States Constitution. R. 6 and 8.

Defendant's general demurrer to the complaint [R. 46] was sustained without leave to amend [R. 52], the minute order stating:

> "Demurrer is sustained without leave to amend on the basis that the complaint does not state a cause of action, and the book being attached to the complaint as an exhibit thereto and the court having read same, the court determines the book is in violation of 311.2 P.C."

The action was thereupon dismissed [R. 53], and plaintiffs appealed to the Supreme Court of the State of California.[1] Such court transferred the cause to the District Court of Appeal of the State of California, Second Appellate District,[2] for decision.

The District Court of Appeal, in a decision reported in 211 A.C.A. 31, 27 Cal. Rptr. 320, affirmed the judgment of the Superior Court. A copy of such opinion is attached as Appendix C.

Plaintiffs thereupon petitioned the Supreme Court of the State of California to hear the matter [R. 55] and such court granted their petition. R. 488.

In their brief on appeal plaintiffs urged that to prevent the sale of the book in question would violate their

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[1]The highest court of the State of California, California Constitution, Art. VI, Secs. 1, 2 and 4.

[2]Such court in the California Judicial System being an appellate court existing between the Superior Court and the Supreme Court. It is, generally speaking, comparable to the Court of Appeals in the Federal System.

right of freedom of the press under the First and Fourteenth Amendments to the Constitution of the United States. R. 119, 124, 148.

The Supreme Court of the State of California reversed the judgment of the Superior Court [R. 523], declaring that the opinions of this court in *Roth v. United States, Alberts v. California, supra, Times Film Corp. v. Chicago, supra, One, Inc. v. Olesen, supra,* and *Sunshine Book Co. v. Summerfield, supra,* indicated that in the field of obscenity all matter was protected under the First and Fourteenth Amendments to the Constitution of the United States except *hard-core pornography.* R. 503-519.

Reasons for Granting the Writ.

The court below, in reaching the conclusion that freedom of speech and the press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States as construed by this court protects all matter other than "hard-core pornography," has misinterpreted the opinion of this court in *Roth v. United States* and *Alberts v. California, supra.*

In *Roth-Alberts* it was clearly stated that obscenity is not within the area of constitutionally protected speech or press. The proper test for obscenity was indicated to be: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.

The only reference in the case to *hard-core pornography* was by Mr. Justice Harlan dissenting in *Roth v. United States*, and construing what he termed a widely

drawn federal statute. The term *hard-core pornography* was not defined.

The Supreme Court of California seized upon this reference and utilized it to indicate that this Court limited the suppression of obscenity to *hard-core pornography*.

Furthermore, while the Supreme Court of California relied heavily on such dissent of Mr. Justice Harlan, it disregarded the judgment of this Court as announced by Mr. Justice Harlan in *Manual Enterprises v. Day*, 370 U.S. 478, particularly the statement (at page 489):

> "At least one important state court and some authoritative commentators have considered Roth and subsequent cases to indicate that only 'hard-core' pornography can constitutionally be reached under this or similar state obscenity statutes. See *People v. Richmond County News, Inc.*, 9 N.Y. 2d 578, 216 N.Y.S. 2d 369, 175 N.E. 2d 681; Lockhart & McClure, supra, at 58-60. Whether 'hard-core' pornography, or something less, be the proper test, we need go no further in the present case than to hold that the magazines in question, taken as a whole, cannot, under any permissible constitutional standard, be deemed to go beyond the pale of contemporary notions of rudimentary decency."

Certainly such is not an expression by the Court that the First and Fourteenth Amendments to the Constitution of the United States so limits the power of the states to suppress obscene matter than only such material as may reach the plateau of *hard-core pornography* is subject to control.

In so concluding, the Supreme Court of the State of California has decided a federal question of substance not in accord with applicable decisions of this Court (Rule 19(a) of Revised Rules of the Supreme Court of the United States, *Rogers v. Missouri P.R. Co.*, 352 U.S. 500, 510, footnote 25).

Another obscenity case from California involving the book *Tropic of Cancer* and presenting, among others, the same or a similar question as presented herein, is now before this Court: *Bradley Reed Smith v. The People of the State of California*, October Term, 1963, No. 72, certiorari granted April 29, 1963.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A.

Opinion and Judgment of the Supreme Court of the State of California.

In the Supreme Court of the State of California in Bank.

Jacob Zeitlin and Paul Ferguson, Plaintiffs and Appellants, vs. Roger Arnebergh, Defendant and Respondent. L.A. 26905.

Filed July 2, 1963.

In this case "Tropic of Cancer" by Henry Miller makes another one of its many court appearances. Its record to date has been a varied one; in some places the book is "obscene" and in others it is not; presently its legal status is largely tied into the geography of its sale or publication.[1] In any event, our first task must

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[1]The book has been held not obscene in Attorney General v. Book Named "Tropic of Cancer" (1962) 344 Mass. .....; McCauley v. Tropic of Cancer (1963 ..... Wis. .....; People v. Fritch (1963) 38 Misc. 2d 333; and Haiman v. Morris (1962, No. 61 S 19718, Superior Ct. of Cook County, Ill.). The book has been held obscene in Besig v. United States (9th Cir. 1953) 208 F. 2d 142; State v. Huntington (1962, No. 24657, Superior Ct. Hartford County, Conn.); and Commonwealth v. Robin (1962, No. 3177, Ct. of Common Pleas, County of Philadelphia, Pa.).

In California there has been one conviction of a bookseller for the sale of the book (People v. Smith (1962, Municipal Ct., Los Angeles Judicial Dist.; affd., No. CRA 5113 Appellate Dept., Superior Ct. of Los Angeles County; cert. granted ..... U.S. .....)) and two acquittals of book sellers (People v. Pershina (No. 16044, Municipal Ct., Central Judicial Dist., Marin County) and People v. McGilvery (No. M-11460, San Diego Municipal Ct.)). In Yudkin v. State (1962) 229 Md. 223, the court reversed the defendant's conviction for the sale of the book because the trial court refused to admit evidence of contemporary community standards, but held that it could not hold as a matter of law that the book was not obscene. In Bunis v. Conway (1962) 17 App. Div. 2d 207, the court held that a declaratory judgment action by a bookseller would lie to determine whether the book was obscene, but the court did not

be to determine whether the instant form of action, that of declaratory relief requested by a bookseller and would-be reader, properly presents the issue of the book's proscription under Penal Code section 311. We hold this form of relief appropriate. Our second question turns upon whether the issue of the application of the statute to this book, within constitutional limitations, rests ultimately with the court, as a matter of law, or with the jury as a question of fact. We think it a legal issue. Finally, since we believe the Penal Code section constitutionally may exercise only hard-core pornography, and since the statute does no more, we hold the book does not fall within its prohibition because "Tropic of Cancer" is not hard-core pornography.

The plaintiff bookseller and plaintiff prospective purchaser brought the action against the city attorney of Los Angeles to secure a declaratory judgment that the book was not "matter" defined as "obscene" by Penal Code section 311,[2] and that its sale would not violate

pass on the merits of the book. The court in State v. Goodhue (1962, No. 2223, Superior Ct. Grafton County, N.H.) held that the book was obscene, but that the defendant's conduct came within the "advancement of literature" exception of the statute. The Attorney General of the United States reportedly announced that the book is protected, and that post office and customs officials cannot interfere with its distribution. (New York Times, June 14, 1961.) In England the Government reportedly announced that it would not interfere with the sale of the book. (New York Times, Western ed., April 12, 1963, p. 11, col. 4.)

[2] Penal Code section 311 provides in part:

(a) "'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance. . . ."

Penal Code section 311.2.[3] Plaintiffs appended to the complaint a copy of the book and excerpts from several book reviews by critics which proclaim its literary merit. Defendant answered, denying many of the allegations of the complaint, but admitting that he contends that the sale of the book violates Penal Code section 311.2. In a separate declaration the defendant stated that he intends to prosecute all persons arrested in the City of Los Angeles for the sale of "Tropic of Cancer." Defendant also entered a general demurrer to the complaint.

The trial court sustained the demurrer without leave to amend and entered a judgment dismissing the action. In a memorandum entry in the minutes the judge stated that he had upheld the demurrer both because, having read the book, he determined it to be obscene and because plaintiffs have failed to state a cause of action.

In assessing the propriety of the trial court's order sustaining the demurrer without leave to amend, we face the preliminary question of whether an action for declaratory judgment instituted by a bookseller and a prospective purchaser will lie to determine the alleged obscenity of a particular book under the code provisions. While potential defendants have frequently sought declaratory relief to avoid prosecution under statutes which they have sought to prove unconstitutional (see e.g., Wollam v. City of Palm Springs (1963) 59 Cal. 2d .....; Katzev v. County of Los Angeles (1959) 52 Cal. 2d 360), plaintiffs here do not challenge the constitutionality of the involved statute un-

[3]Penal Code section 311.2 provides in part:
"Every person who knowingly . . . distributes, or offers to distribute . . . any obscene matter is guilty of a misdemeanor."

less it sanctions the prosecution of "Tropic of Cancer." In that event, however, plaintiffs do contend that the statute both constitutes an unconstitutional restraint on freedom of speech and also attempts a proscription which is unconstitutionally vague under the First and Fourteenth Amendments to the United States Constitution and Article I, sections 9 and 12, of the California Constitution.[4]

The precedents, as well as other compelling reasons, support a declaratory relief action in the present case. The gravamen of the plaintiffs' complaint is that although the statute cannot properly be interpreted to apply to "Tropic of Cancer," defendant nevertheless contends that the book is "obscene matter" within the terms of the statute and intends to prosecute those who sell it. Thus the complaint alleges a genuine controversy involving the construction of particular legislation as to which it seeks a judicial determination. Such a complaint according to the prior cases, sufficiently states a claim for declaratory relief. (Walker v. County of Los Angeles (1961) 55 Cal. 2d 626, 637; Hoyt v. Board of Civil Service Commrs. (1942) 21 Cal. 2d 399.)

We have stated that considerations beyond the precedents support the adjudication of the alleged obscenity of a particular book in a declaratory relief action.[5] As we shall explain in more detail, the vendor of the questioned book faces the possibility of prosecution and his

[4]Our interpretation of the statute, which we set forth *infra*, renders unnecessary the consideration of these contentions as to unconstitutionality.

[5]These considerations are also discussed in Binis v. Conway (1962) 17 App. Div. 2d 207; Borchard, Declaratory Judgments (2d ed. 1941) p. 1035.

very fear of it may work a de facto censorship of the publication. The would-be reader, in the absence of declaratory relief, may be deprived of his constitutional rights. Finally, diverse results of the enforcement of the obscenity statute may result in a crazy-quilt pattern of a publication's suppression.

Plaintiff Zeitlin alleges that he is engaged in business as a bookseller and that he wishes to sell "Tropic of Cancer" in his bookstore, but that he is prevented from offering the book because he fears that if he does so defendant will institute criminal proceedings against him. To deny Zeitlin, a legitimate businessman, an opportunity for declaratory relief is to force him to choose between undesirable alternatives. If he continues to sell the book he incurs the risk of criminal prosecution and faces the fine, jail sentence, or both, which may be imposed if he is found guilty,[6] or he sustains the accompanying stigma which attaches even though he may ultimately be found innocent.[7] As an alternative he may assume the role of self-appointed censor, prodded by the city attorney, and discontinue the sale of any book which could possibly offend the latter. The city attorney should not thus become an

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[6]Penal Code section 311.9 provides in part:

"(a) Every person who violates Section 311.2 is punishable by fine of not more than one thousand dollars ($1,000) plus five dollars ($5) for each additional unit of material coming within the provisions of this chapter, which is involved in the offense, not to exceed ten thousand dollars ($10,000), or by imprisonment in the county jail for not more than six months plus one day for each additional unit of material coming within the provisions of this chapter, and which is involved in the offense, such basic maximum and additional days not to exceed 360 days in the county jail, or by both such fine and imprisonment."

[7]People v. Elliot (1960) 54 Cal. 2d 498, 504; Greenberg v. Superior Court (1942) 19 Cal. 2d 319.

indirect censor of public reading matter; his abuse of such power could constitute an unlawful restraint upon the dissemination of literature not otherwise censorable. (Bantam Books v. Sullivan (1963) ..... U.S. .....)

Plaintiff Ferguson alleges that he desires to purchase a copy of "Tropic of Cancer" but is unable to do so because the bookseller, thus fearful of prosecution, refuses to sell the publication. Unless Ferguson is able to find a bookseller willing to face the possibility of criminal prosecution and the attendant described risks, he will be deprived of his basic constitutional right to read. Thus declaratory relief may offer the only method for vindication of this constitutional right.

A final reason for the invocation of declaratory relief lies in its decisiveness. Sporadic and diverse criminal prosecutions must necessarily produce discriminatory results. A finding of guilt of one purveyor of obscene publications will not necessarily discourage others; indeed such vendors characteristically operate under-cover and are inclined to recidivism.[9] If, on the other hand, a verdict expresses a determination that the material is not obscene the city attorney is still free to prosecute another bookseller for selling the same publication. If a criminal verdict, whether of guilt or of innocence, operates primarily within a particular county to ban the book in the case of guilt, or to encourage its sale in the case of innocence, an opposite result might readily obtain in another county. Such an approach

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[8]See D. H. Lawrence, Pornography and Obscenity, reprinted in The Portable Lawrence (1947) pp. 646, 653.

[9]See e.g., Roth v. United States (1956) 77 S.Ct. 17, n. 2 (Roth's application for bail.) ". . . petitioner has been convicted in or pleaded guilty in six criminal proceedings involving the dissemination of obscene literature. . . ."

must inevitably engender a hodgepodge pattern of suppression and sale.

Nor does our statutory procedure insure a method of uniform adjudication by means of criminal prosecution. Until a third offense, the sale of obscene matter to adults constitutes a misdemeanor. (Pen. Code, § 311.9.) Thus the defendant ordinarily will be tried in the municipal court; if found guilty he may appeal, as a matter of right, only to the appellate department of the superior court.[10] To resolve the issue at this level raises not only the possibility of contradictory rulings on the obscenity of a particular work, but also the probability of conflicting interpretations of the obviously perplexing Penal Code section 311.

Since plaintiffs set forth facts showing the existence of an actual controversy and have requested that these rights be adjudged by the court in a matter in which the court is competent to grant declaratory relief, they have stated a legally sufficient complaint. Upon presentation of such complaint, a plaintiff is entitled to a declaration of his rights, whether the declaration be favorable or adverse; thus in the instant case the trial court's order sustaining the demurrer and its dismissal of the action cannot be upheld upon the ground that plaintiffs pursued the wrong kind of action. (Salsbery v. Ritter (1957) 48 Cal. 2d 1; Columbia Pictures v. De Toth (1945) 26 Cal. 2d 753; Maguire v. Hibernia S. & L. Soc. (1944) 23 Cal. 2d 719.)

As we have stated, "Our decision that controversies are shown to exist, however, does not resolve them, and we must therefore pass upon the questions of law that

[10]Pen. Code, §§ 1466-1471; Calif. Rules of Court, rules 61-69

must be decided to reach a final determination of the case. (Code Civ. Proc., § 53.)" (Salsbery v. Ritter, supra, at p. 7; Columbia Pictures v. De Toth, supra.) While in *Maguire* the unresolved issues of the special demurrer in the trial court justified the termination of appellate review, we do not face such a situation here. Termination at that stage in the instant case would merely provoke further appellate recourse since the record discloses that the trial court dismissed the case on the merits and the legal issues are clearly presented by the pleadings. Thus, as in Salsbery v. Ritter, supra, and Columbia Pictures v. De Toth, supra, we shall proceed, as we must, to a consideration of the determinative questions of law raised in plaintiffs' complaint.

Turning to the issue of statutory and constitutional construction which the complaint raises, we believe that this issue must be resolved by this court; it cannot properly be reposed in a jury for final disposition as a question of fact.[11] The crux of our case is whether the definition of obscene matter in Penal Code section 311 sanctions prosecution of sellers of "Tropic of Cancer" and whether the constitutional guaranties of freedom of speech and freedom of the press (United States Constitution, First and Fourteenth Amendments; Calif. Const., art. I, §9) permit such prosecution. As we shall point out in more detail, the courts have long recognized that such questions of statutory and con-

[11]By so holding, we do not wish to be interpreted as sanctioning the impairment of rights traditionally accorded criminal defendants: the right to introduce evidence which tends to disprove the accusation (In re Harris (1961) 56 Cal. 2d 879) and the right to have the jury determine all relevant issues bearing upon guilt, including the question of whether the material is obscene.

stitutional construction and application call for court decisions; they raise issues, not of the ascertainment of historical fact, but the definition of statutory proscription and constitutional protection; the court itself must determine the law of the case for the sake of consistent interpretation of the statute and uniform determination of whether particular matter is obscene.

As Justice Harlan eloquently states in Roth v. United States (1957) 354 U.S. 476: "Every communication has an individuality and 'value' of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressable within constitutional standards. . . . .

"I do not think that reviewing courts can escape this responsibility by saying that the trier of facts, be it a jury or a judge, has labeled the questioned matter as 'obscene,' for, if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind. . . ." (354 U.S. at pp. 497-498.)

Justice Harlan's conception of the nature of judicial review to be accorded a finding of obscenity expresses a doctrine firmly imbedded in our constitutional law: that the reviewing court must make an *independent examination* of the whole record in cases involving the constitutional issue of free speech. (Edwards v. South Carolina (1963) ..... U.S. ....., ... ; Niemotko v. Maryland (1951) 340 U.S. 268; Feiner v. New York

(1951) 340 U.S. 315; Pennekamp v. Florida (1946) 328 U.S. 331; Fiske v. Kansas (1927) 274 U.S. 380; Attorney General v. Book Named "Tropic of Cancer" (1962) 344 Mass. ..... [184 N.E. 2d 328]; People v. Richmond County News (1961) 9 N.Y. 2d 578, 580-581 [opinion of Fuld, J.]; see Supreme Court Review of State Findings of Fact in Fourteenth Amendment Cases, 14 Stan. L. Rev. 328 (1962).)[12] As Judge Fuld stated in the Richmond County News case, ". . . . if an appellate court were to rely upon and be bound by the opinion of the trier of facts as to the obscenity of a publication it would be abdicating its role as an arbiter of constitutional issues." (9 N.Y. 2d at p. 581.)

The determination of what is obscene in the statutory or constitutional sense is not a question of fact (i.e., a question of what happened) but rather is a question of fact mixed with a determination of law: a "constitutional fact." Historical facts, as such, are rarely at issue in that part of an obscenity prosecution which focuses upon the character of the material involved.[13] In the instant case the parties agree that they both refer to the same book, "Tropic of Cancer," written by the same author, Henry Miller. The dispute rather, pivots upon whether the volume trans-

[12]The same principle applies in the coerced confession cases: People v. Trout (1960) 54 Cal. 2d 576; People v. Berve (1958) 51 Cal. 2d 286; People v. Jones (1944) 24 Cal. 2d 602; Blackburn v. Alabama (1960) 361 U.S. 199; Ashcraft v. Tennessee (1944) 322 U.S. 143.

[13]The determination of other elements necessary to make out a violation of Penal Code section 311.2 may be dependent upon historical facts. For example, on the issue of scienter it may be relevant whether the defendant actually read the allegedly obscene matter prior to the sale of the material.

gresses the standards imposed by the Legislature and by the Constitutions; our judicial system entrusts this decision ultimately to the courts.

Thus the draftsmen of the Model Penal Code of the American Law Institute have recently recognized that, in the interests of uniformity, the question of obscenity must be left to the independent judgment of courts. In the Tentative Draft of the Model Penal Code the draftsmen originally inserted a provision which allowed both the trial and appellate courts to make an independent determination of the obscenity of the material, permitting the courts in so doing to consider, as evidence, written submissions by behaviorial scientists.[11] The reporter's notes to the Tentative Draft state that the Institute disapproved this provision "by a close vote." (The tentative draft had been published only one month before the decision in *Roth*.) Section 251.4(4) of the Proposed Official Draft of the Model Penal Code (1962) provides in part, "The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene."

The reporter's notes to the Proposed Official Draft contain the following comment on this provision: ". . . The present version is much simplified and omits provisions, to which most objections were voiced, for judges to consult behavioral scientists and for written submissions by these consultants. What we preserve in the present draft is *the independent judgment of the court on the question of obscenity* without impairing defendant's right to a jury trial. This is desirable in order

[11] American Law Institute, Model Penal Code, Tentative Draft No. 6, § 207.10. § 251.4 is the corresponding section in the Proposed Official Draft.

to promote statewide uniformity of standards in this critical area. The action of the Supreme Court of the United States in a series of obscenity cases after the Roth decision indicates the large extent to which the question of obscenity is one of law in any case, because of the application of the First Amendment." (Emphasis added; p. 241.)

Finally, we do not believe that the definition of "obscene" material as that which "to the *average person* . . . predominant appeal . . . is to prurient interest . . ." (emphasis added) indicates that the ultimate determination of that question is always for the jury. These words fix a *standard* which is to be applied to the material; they do not designate the body which is to apply the standard. The statutory language does not inherently predicate a question for the jury; it merely frames a definition. As we hereinafter point out, the Legislature wrote the words "average man" into the statute because a lesser standard would offend constitutional guarantees; the phrase does not serve to mark the respective spheres of the court and jury.

We turn, then, to our task of determining whether "Tropic of Cancer" constitutes obscene matter within the meaning of the statute and the constitutional limitations. To understand the statute we must first examine the constitutional setting in which the California Legislature in 1961 completely recast Penal Code section 311 and 312 (Stats. 1961, ch. 2147). The Legislature patterned its definition of obscenity upon that set forth in the American Law Institute's Model Penal Code (§ 207.10), portions of which had been approved as constitutionally permissible standards by the United States Supreme Court in Roth v. United States, supra

(1957) 354 U.S. 476. This decision and others of the United States Supreme Court, we think, impliedly drew a line of constitutional protection around all material except that which has been described as hard-core pornography. In this analysis which we shall develop, we follow the interpretations of the distinguished New York Court of Appeals and Supreme Judicial Court of Massachusetts.

Roth and the companion case of Alberts v. California[15] involved appeals by defendants from convictions for violation of the federal and California obscenity statutes respectively. While these were the first United States Supreme Court cases squarely to confront the question of "whether obscenity is utterance within the area of protected speech and press" (p. 481), the issues were so framed that the majority of the Court adjudicated the validity of each statute on its face without passing on the merits of the attacked materials. As the majority opinion stated, "No issue is presented in either case concerning the obscenity of the material involved." (P. 481; fn. 8.) The Court therefore had no occasion to rule upon the three categories of material presented to it by the brief of the Solicitor General.[16] Affirming the convictions of Roth and Alberts, the Supreme Court held the statute did not violate the requirements of the United States Constitution[17] as to freedom of expression and definitude.

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[15]The Court disposed of both cases in one opinion.

[16]Lockhart & McClure, Censorship of Obscenity, the Developing Constitutional Standards, 45 Minn. L. Rev. 5, 26 (1960).

[17]In *Roth* the Court also considered whether the power to punish obscenity was reserved to the states by the Ninth and Tenth Amendments; in *Alberts* it considered whether the federal statute regulating the mailing of obscene matter pre-empted regulation by the states. The Court rejected both contentions.

Mr. Justice Brennan, writing the majority opinion, held that "obscenity is not within the area of constitutionally protected speech or press" (p. 485) because, in the words that were later incorporated in the California statute, obscenity is "utterly without redeeming social importance." (P. 484.) He points out that "sex and obscenity are not synonymous . . . [and the] portrayal of sex, e.g., in art, literature and scientific works . . . [is entitled to] the constitutional protection of freedom of speech and press" (p. 487) provided that it does not become the designated kind of obscenity. The majority opinion sought to separate the protected from the unprotected material by the use of the term "obscenity." It approved the statutory standards under which the defendants were convicted, as well as the Model Penal Code formulation, because these tests did not contain the vices present in the archaic test used in Regina v. Hicklin (1868) L.R. 3 Q.B. 360, a test which many,[18] but not all,[19] American courts had discarded.

The Court expressly exposed the two basic flaws in *Hicklin*. One such vice was that *Hicklin* judged obscenity by the effect of isolated passages; the Model Penal Code expresses its rejection of this test by requiring that the material be "considered as a whole" and that "its predominant appeal" be "to the prurient interest." In order to give color, texture and meaning to the whole of his expression, an artist may sometimes feel that he must depict matters which, standing alone,

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[18]See e.g., American Civil Liberties Union v. Chicago (1954) 3 Ill. 2d 334; United States v. One Book Entitled "Ulysses", 72 F. 2d 705 (2d Cir. 1934).

[19]See e.g., Besig v. United States, 208 F. 2d 142 (9th Cir. 1953).

would unanimously be condemned as beyond the limits of propriety. (Cf. Grove Press v. Christenberry (2d Cir. 1960) 276 F. 2d 433, 438-439; United States v. One Book Called "Ulysses". (S.D.N.Y. 1933) 5 F. Supp. 182, 184.) Thus in *Roth* the Court gave constitutional recognition to the employment of the device of artistic shock often present in the myriad of art forms which our society demands for its intellectual and cultural growth. The insistence upon judgment of the material "as a whole" and by its "predominant appeal" also serves to alleviate, but not necessarily entirely abolish, the dilemma which has been noted by several courts which have observed the coarseness of portions of recognized classics of art and literature although no rational person would condemn such works as obscene.[20]

The other major vice of *Hicklin* which the Supreme Court rejected was its application of the test of isolated passages upon those metaphysical personalities "whose minds are open to such immoral influences and into whose hands a publication may fall"; i.e., the most susceptible persons. The constitutional requirement for a standard phrased in terms of the reaction of an average adult to the material rather than that of the most susceptible person, had been, of course, forecast by the Court's unanimous rejection of the Michigan obscenity statute in Butler v. Michigan (1957) 352 U.S. 380.

The four Justices who did not join in the majority opinion recognized that material relating to sex found protection in the constitutional guarantee of freedom of

[20] United States v. Roth, 237 F. 2d 796, 819 (2d Cir. 1956) (concurring opinion of Frank, J.), aff'd. sub. nom. Roth v. United States (1957) 354 U.S. 476; United States v. One Book Entitled "Ulysses" (2d Cir. 1934) 72 F. 2d 705; Commonwealth v. Gordon (1949) 66 Pa. D. & C. 101.

expression. Indeed, Justices Douglas and Black argued that the Constitution forbade all obscenity censorship except in cases in which it were demonstrated that "the particular publication has an impact on action that the government can control." (P. 511.) In a short opinion, Chief Justice Warren isolated the central issue as the "conduct of the defendant" rather than the "obscenity of a book or picture." (P. 495.) Apparently the Chief Justice extends constitutional protection to obscene materials if the defendant's own conduct is not personally reprehensible

The most revealing opinion is that of Justice Harlan, who concurred in *Alberts* but dissented in *Roth*. We have pointed out that Justice Harlan held that a reviewing court should determine for itself, by scrutiny of the attacked material, whether it "is suppressable within constitutional standards." (P. 497.) Justice Harlan's opinion, which applies this test to the material itself, constitutes the sole such approach of any of the opinions. Accordingly, in *Roth* Justice Harlan found the material did not constitute hard-core pornography and voted to reverse the conviction. He stated: ". . . The point is that this statute, as here construed, defines obscenity so widely that it encompasses matters which might very well be protected speech. I do not think that the federal statute can be constitutionally construed to reach other than what the Government has termed as 'hard-core' pornography. . . ." (P. 507.) In *Alberts* he concluded that the suppression of the material would not so "interfere with the communication of 'ideas' in any proper sense of that term" (p. 503) as to offend due process, and therefore affirmed the conviction.

The hard-core pornography test so delineated by Justice Harlan finds confirmation in three succeeding decisions of the United States Supreme Court.[21] The cases arose from decisions of the Court of Appeals which upheld the obscenity of the material there involved: a film dealing with the seduction of a 16-year-old boy by an older woman and other "illicit sexual intimacies and acts" (Times Film Corp. v. Chicago (1957) 355 U.S. 35); a magazine for homosexuals (One, Inc. v. Olesen (1958) 355 U.S. 371); and a nudist magazine (Sunshine Book Co. v. Summerfield (1958) 355 U.S. 372).[22] In per curiam decisions cit-

[21]A fourth such case, Mounce v. United States (1957) 355 U.S. 180, probably is not within this group because the United States Supreme Court reversed the cause for consideration in light of *Roth* after the Solicitor General conceded that the court below had applied an erroneous standard.

[22]The Court of Appeals in Times Film Corp. v. City of Chicago (7th Cir. 1957) 244 F. 2d 432, 436, described the material as: "The thread of the story is supercharged . . . by a series of illicit sexual intimacies and acts. . . . [A] flying start is made when a 16-years old boy is shown completely nude on a bathing beach in the presence of a group of younger girls [as a result of a boating accident]. On that plane the narrative proceeds to reveal the seduction of this boy by a physically attractive woman old enough to be his mother. Under the influence of this experience and an arrangement to repeat it, the boy thereupon engages in sexual relations with a girl of his own age. The erotic thread of the story is carried, without deviation toward any wholesome idea, through scene after scene. The narrative is graphically pictured with nothing omitted except those sexual consummations which are plainly suggested but meaningfully omitted and thus, by the very fact of omission, emphasized."

The Court of Appeals in One, Inc. v. Olesen (9th Cir. 1957) 241 F. 2d 772, 777, described the material as: "The article 'Sappho Remembered' is the story of a lesbian's influence on a young girl only twenty years of age but 'actually nearer sixteen in many essential ways of maturity,' in her struggle to choose between a life with the lesbian, or a normal married life with her childhood sweetheart. The lesbian's affair with her room-mate while in college, resulting in the lesbian's expulsion from college, is recounted to bring in the jealousy

ing only *Roth* or *Alberts*, the Supreme Court reversed the judgments.

Clearly the most plausible meaning of these summary reversals, in view of the citation of only *Roth* or *Alberts*,[23] must be that the materials there involved

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angle. The climax is reached when the young girl gives up her chance for a normal married life to live with the lesbian. This article is nothing more than cheap pornography calculated to promote lesbianism. It falls far short of dealing with homosexuality from the scientific, historical and critical point of view.

"The poem 'Lord Samuel and Lord Montagu' is about the alleged homosexual activities of Lord Montagu and other British Peers and contains a warning to all males to avoid the public toilets while Lord Samuel is 'sniffing round the drains' of Piccadilly (London). The poem pertains to sexual matters of such a vulgar and indecent nature that it tends to arouse a feeling of disgust and revulsion. It is dirty, vulgar and offensive to the moral senses."

The District Court, in Sunshine Book Co. v. Summerfield (D.D.C. 1955) 128 F. Supp. 564, 571-572, of one of the photographs found obscene, said:

"On page 29 [of Sunshine & Health for February, 1955] there is a most unusual picture. Here are two women who appear to be in their late twenties or early thirties. The woman to the left appears to be approximately 5 foot 7. She must weigh in the neighborhood of 250 pounds. She is exceedingly obese.

"She has large, elephantine breasts that hang from her shoulder to her waist. They are exceedingly large. The thighs are very obese. She is standing in snow, wearing galoshes. But the part which is offensive, obscene, filthy and indecent is the public area shown.

". . . The hair extends outwardly virtually to the hip bone. It looks to the Court like a retouched picture because the hair line instead of being straight is actually scalloped or in a half-moon shape, which makes the woman grotesque, vile, filthy, the representation is dirty, and the Court will hold that the picture is obscene in the sense that it is indecent, it is filthy, and it is obscene as a matter of fact. . . ."

[23]Each of these cases involved procedural problems which would have justified the court in refusing to consider the issue of obscenity. The Court's citation of *Roth* or *Alberts*, however, indicates that the reversals were on the obscenity issue. These cases are ably analyzed in Lockhart and McClure, supra, fn. 16 at pp. 32-39; Kalven, The Metaphysics of the Law of

could not be held obscene. As Professor Kalven observes: "These three decisions, coupled with the citation of *Roth*, point unmistakably in one direction: the Court is feeling the pressure generated by the two-level theory to restrict obscenity to the worthless and hence to something akin to hard-core pornography. Thus the three decisions appear to add important gloss to the *Roth* definition. And the prophecy that *Roth* would serve to narrow the range of obscenity regulation appears fulfilled." (Kalven, The Metaphysics of the Law of Obscenity, 1960 Sup. Ct. Rev. 1, 43.)[24]

Kingsley Int. Pictures Corp. v. Regents (1959) 360 U.S. 684, although interpreted by the majority of the Court as a case which involved an attempt to suppress matter dealing with sex for reasons other than the "ob-

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Obscenity, 1960 Supreme Court Review, 1, 42-45; Comment, Per Curiam Decisions of the Supreme Court: 1957 Term, 26 U. of Chi. L. Rev. 279, 308-313 (1958). Professor Kalven quotes at length from a brief Thurman Arnold submitted to the Vermont Supreme Court which espouses a challenging position. Kalven summarizes Arnold's position as: "The main point is advice to the Vermont court on how to handle the issue before it sensibly and diplomatically. Mr. Arnold purports to get his rule of judicial prudence from the United States Supreme Court: 'The rule is simple: the court should hold items before it not obscene unless they amount to hard-core pornography, and should, after rendering a decision, shut up. In Mr. Arnold's view, any fool can quickly recognize hard-core pornography, but it is a fatal trap for judicial decorum and judicial sanity to attempt thereafter to write an opinion explaining why." (P. 43.)

[24]To Professor Kalven, the two-level approach to problems of the First Amendment results from the United States Supreme Court's analysis which requires a showing of a clear and present danger as the ground for the suppression of most utterances but which allows the suppression of obscenity (Roth v. United States, supra), "fighting words" (Chaplinsky v. New Hampshire (1942) 315 U.S. 568, and group libel (Beauharnais v. Illinois (1952) 343 U.S. 250) without such a showing because the utterances there involved are "utterly without redeeming social importance" (*Roth*) or are "no essential part of any exposition of ideas" (*Chaplinsky* and *Beauharnais*).

scenity" of the material, also serves to illustrate the great breadth of protection accorded materials dealing with sex. There the New York Court of Appeals indicated that although the motion picture involved was not obscene, it might nonetheless be censored because it pictured adultery as proper behavior. The Supreme Court reversed, holding that this interfered with the freedom to advocate, which necessarily includes the freedom to advocate unpopular, even hateful, ideas. The breadth of the constitutional protection is also illustrated by the several cases involving various procedures used to suppress alleged obscenity. (Kingsley Books v. Brown (1957) 354 U.S. 436; Smith v. California (1959) 361 U.S. 147; Marcus v. Search Warrant (1961) 367 U.S. 717; Bantam Books v. Sullivan (1963) ..... U.S. .....)

As we have stated, the highest courts of New York and Massachusetts, in interpreting the Supreme Court decisions, have recognized that boundary lines for the forbidden pale of obscenity must delimit only the area of hard-core pornography. Justice Fuld's opinion in People v. Richmond County News (1961) 9 N.Y. 2d 578, states: "Mindful of the constitutional necessity to open the door barring state intrusion into this area 'only the slight crack necessary' (*Roth v. United States*, 354 U.S. 476, 488, *supra*), and desirous of erecting a standard which embodies the most universal moral sensibilities and may be applied objectively, *we are of the opinion that the prohibitions of section 1141 of the Penal Law should apply only to what may properly be termed 'hard-core pornography'.*" (P. 586; emphasis added.)

Chief Judge Desmond's concurring opinion reiterates this analysis: "St. John-Stevas, one of the sound-

est and sanest of today's writers on the law of obscenity, says that: 'A pornographic book * * * is one deliberately designed to stimulate sex feelings and to act as an aphrodisiac' (Obscentity and the Law, p. 2; *cf. Roth v. United States*, 354 U. S. 476, 486, 487.) The identical thought is in Judge Woolsey's famed *Ulysses* opinion (*United States v. One Book Called Ulysses*, 5 F. Supp. 182, affd. 72 F. 2d 705, 707) and in Justice Brennan's famous phrase: 'dominent theme of the material taken as a whole appeals to prurient interest' (*Roth v. United States supra*, p. 489). *The inquiry for the court therefore, is whether the publication is so entirely obscene as to amount to 'hard-core pornography'.* . . . " (Pp. 588-589, emphasis added.)

Last year the Supreme Judicial Court of Massachusetts, in ruling upon the alleged obscenity of the book before us, applied the same test. That court in Attorney General v. Book Named "Tropic of Cancer" (1962), 344 Mass. ..... [184 N. E. 2d 328], explained that one of the five basic tenets of the *Roth* case was that "Hard core, commercial pornography, 'utterly without redeeming social importance' (see 354 U. S. 476, 484-485, 77 S. Ct. 1304, 1309) is not within the protection of the First Amendment." (P. .....) . The court stated finally: "We conclude, therefore, as in effect the New York court did in the Richmond County News case, that, with respect to material designed for general circulation, only predominantly 'hard core' pornography, without redeeming social significance, is obscene in the constitutional sense." (Pp. .....)

In substance these courts, applying the rulings of the United States Supreme Court, hold that if material is

commercial obscenity or saleable pornography it is obscenity in the sense that it is utterly without redeeming social importance; it is hard-core pornography; as such it lies outside the protective embrace of the First Amendment. If the material, however, has literary value, if it is a serious work of literature or art, then it possesses redeeming social importance and obtains the benefit of the constitutional guarantees.

Cognizant of these constitutional guarantees, the Legislature wrote a statute which, in substance, prohibited hard-core pornography;[25] the draftsmen recog-

[25]Of course identifying and delimiting "hardcore pornography" presents its own problems. In Marcus v. Search Warrant (1961), 367 U.S. 717, 730, the Court stated: "[I]n Roth itself we expressly recognized the complexity of the test of obscenity fashioned in that case, and the vital necessity in its application of safeguards to prevent denial of 'the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest.'" In Bantam Books v. Sullivan (1963) ..... U.S. ....., ... the Court quoted this language from *Marcus* and went on to note that "constitutionally protected expression . . . . is often separated from obscenity only by a dim and uncertain line." (See Note, 76 Harv. L. Rev. 1498 (1963).) Undoubtedly we are in an area where the recourse to verbal descriptions is ultra-hazardous. We note, however, two descriptions which may illuminate the area. Kaplan has written: "[Pornography] is not itself the *object* of an experience, esthetic or any other, but rather a stimulus *to* an experience not focused on it. It serves to elicit not the imaginative contemplation of an expressive substance, but rather the release in fantasy of a compelling impulse." (Kaplan, Obscenity as an Esthetic Category, 20 Law & Contemp. Prob. 544, 548 (1955).)

The Krohausens state: "*In pornography* (hard core obscenity) *the main purpose is to stimulate erotic response* in the reader. And that is all. *In erotic realism, truthful description of the basic realities of life, as the individual experiences it, is of the essence*, even if such protrayals . . . have a decidedly anti-erotic effect. But by the same token, if, while writing realistically on the subject of sex, the author succeeds in moving his reader, this too, is erotic realism, *and it is axiomatic that the reader should respond erotically to such writing*, just as the sensitive reader will respond, perhaps by actually crying, to a sad scene, or by laughing when laughter is evoked." (Kronhausen, Pornography and the Law (1959 p. 18.) (Emphasis in original.)

nized that a wider proscription would trespass upon an area which is constitutionally protected. The legislative history itself shows a deliberate narrowing of the definition of "obscene" material, indeed, no words in the language could more totally express constriction of the concept of obscenity than those which the Legislature adopted. As we shall explain, the Legislature intentionally incorporated as part of the definition itself the important provision that obscene matter "is matter which is utterly without redeeming social importance," changing the function of these words from a description of a matter of defense to an element of the offense.

As originally introduced on February 28, 1961, Assembly Bill 1979 defined obscenity as that which "to the average person applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest." Subsequently on April 21, 1961, the Assembly further narrowed the definition by adding, "i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters." After another set of amendments not here relevant, the Assembly added, on May 22, 1961, "or that it had the slightest redeeming social importance" to what is now section 311.8, which provides as a *defense* to a charge of obscenity that the matter is "in aid of scientific or educational purposes." The Assembly then passed the bill and sent it to the Senate.

The Senate substituted "other legitimate social purpose" for the Assembly language "or that it had the slightest redeeming social importance," and returned the bill to the Assembly.

On June 15, 1961, the Assembly, by a vote of 60-19, refused to concur in the Senate's amendments. An Assembly-Senate conference committee was appointed to break the deadlock. The next day the committee reported out the present version of section 311, with the words "and is matter which is utterly without redeeming social importance" added to the *definition* of obscenity in section 311 and providing in section 311.8 for a defense if the material be "in aid of legitimate scientific or educational purposes." (Assembly Journal, 1961 Regular Session, p. 5975.) With these changes the bill passed both houses and was signed by the Governor.

The importance of the insertion of this crucial language in the definition of obscen rather than in the defense to it, is overshadowed only the sweep of the words themselves. Webster's Third New International Dictionary defines "utterly" as: ". . . to an absolute or extreme degree; to the full extent; absolutely, altogether, entirely, fully, thoroughly, totally." (Compare similar restrictive judicial definitions of the term in *Insurance Company v. Gossler* (1877), 96 U. S. 645; *Moody v. Moody* (1920), 118 Me. 454, 456; *Pearsoll v. Chapin* (1862), 44 Pa. St. 9.) The meanings conveyed by the words "reasonably" or "preponderantly" are well known. Had such been intended, the appropriate terms would have been used. By employing the term "utterly" the Legislature indicated its intention to give legal sanction to all material relating to sex except that which was *totally* devoid of social importance. The only material that falls into the latter category is hard-core pornography. This language, indeed, is the language of *Roth*; as we have shown, subsequent Su-

preme Court decisions, state courts and commentators have interpreted it to describe hard-core pornography.

The defendant construes the statute with the emphasis on "redeeming"; he contends that this indicates that the social importance of the material must outweigh its prurient appeal. This construction, however, reads the word "utterly," a term which permits no such balancing, out of the statute. By examining the origin of this phrase in *Roth* we are led to a construction which gives the whole phrase a consistent meaning: "redeeming" refers not to a balancing of the pruriency against the social importance of the material, but rather to the *presence* of matters of social importance in the content which will *recover* for the material its position as constitutionally protected utterance.

If, then, the statutory proscription, consonant with constitutional limitations, prohibits only hard-core pornography, we must, as a final matter, determine if "Tropic of Cancer" constitutes such pornography. We, like four other courts that have ruled upon the book,[26] do not think so.

"Tropic of Cancer" is a semi-autobiographical novel written in the style of a surrealistic stream of consciousness which chronicles the author's experiences during his self-imposed exile in Paris in the early 1930's. Miller went to Paris to seek a rebirth within himself; he set himself the task of stripping away the restraints of the past so that he could emerge as a writer. He found that to do so he would have to

[26] Attorney General v. Book Named "Tropic of Cancer" (1962), 344 Mass. ....; McCauley v. Tropic of Cancer (1963), ... Wis. ....; People v. Fritch (1963) 38 Misc. 333; and Haiman v. Morris (1962) No. 61 S 19718, Superior Ct. of Cook County, Ill.).

achieve a cosmology, a view of the universe derived out of the intgrpretation of his experiences. Miller shares with the reader the process of prying that cosmology out of the folds of his existence. Hence any undertaking, be it a regular job or a fixed schedule of sponging food from his acquaintances, must be abandoned when it threatens to interfere with this grandoise search.

In examining the episodes which Miller relates, we note a frequently recurring pattern. Experiences not ordinarily pictured as related to sexual motivations are analyzed in flights of surrealistic fantasy in terms of sexual experiences. Ordinary sexual experiences, on the other hand, may evoke to Miller images usually unconnected with such experiences—for example, after setting the conventional stage in which he and a companion partake of the services of a prostitute, his fantasy describes the episode in terms of a machine with a broken cog. Thus, much of Miller's quest for a cosmology consists of his attempt to find the role of his sexual drives and frustrations. This aspect of the book recalls the caveat of Justice Brennan in *Roth*:

> "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern." (354 U.S. at p. 487.)

Miller's treatment of sex in "Tropic of Cancer" reflects his search for an understanding of this "mysterious motive force." But there is absent from the book the sadism, masochism, and treatment of sex in a morbid or shameful manner which frequently marks pornography.

In sum, the book in narrating Miller's stream of consciousness necessarily expresses the writer's thoughts in their most primitive aspect, often violent and repulsive, and constantly in four-letter words. The book embraces the emotional, the sexual, the intellectual, and every other kind of stimulus that intrudes upon the writer's consciousness. Thus the book is a kind of grotesque, unorthodox artform. But indeed, such artforms are not confined to literature; they appear and reappear in all phases of artistic expression.[27]

Such an art-form must be distinguished from that which is designed to excite or attract pruriency; it surely does not constitute hard-core pornography. Clearly the statute reposes no authority in the courts to act as censors of the manners or formulation of such artistic expression. The danger of state censorship has been too graphically demonstrated by the current decadence of Soviet art for us to assume that either *Roth* or the Legislature intended to import such debilitation.[28]

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[27] "Modern art is, however, anti-impressionistic in yet another respect: it is a fundamentally 'ugly' art, foregoing the euphony, the fascinating forms, tone and colours of impressionism. It destroys pictorial values in painting, carefully and consistently executed images in poetry and melody and tonality in music. It implies an anxious escape from everything pleasant and agreeable, everything purely decorative and ingratiating. [P]ost impressionist art is the first to stress the grotesqueness and mendacity of this culture. Hence the fight against all voluptuous and hedonistic feelings, hence the gloom, depression and torment in the works of Picasso, Kafka, and Joyce. (Hauser, The Social History of Art, 230-231 (1958).

[28] As one student of Soviety literary controls observes: "Thus, there are fundamentally three standards for estimating the merit of a literary work: the truthfulness, or party-minded spirit, of the works' portrayal of reality, the works' pedagogic potentiality, and its intelligibilty to the broad masses—all prerequisites for transforming literature into a serviceable

Indeed, a legal proscription cannot in any event constrict artistic creation. Man's drive for self-expression, which over the centuries has built his monuments, does not stay within set bounds; the creations which yesterday were the detested and the obscene become the classics of today. The quicksilver of creativity will not be solidified by legal pronouncement; it will necessarily flow into new and sometimes frightening fields. If, indeed, courts try to forbid new and exotic expression they will surely and fortunately fail. The new forms of expression, even though formally banned, will, as they always have, remain alive in man's consciousness. The court-made excommunication, if it is too wide or if it interferes with true creativity will be rejected like incantations of forgotten witch-doctors. Courts must therefore move here with utmost caution; they tread in a field where a lack of restraint can only invite defeat and only impair man's most precious potentiality: his capacity for self-expression.

The judgment is reversed for further proceedings consistent with this opinion.

TOBRINER, *J.*

We concur:

GIBSON, *C. J.*
TRAYNOR, *J.*
SCHAUER, *J.*
McCOMB, *J.*
PETERS, *J.*
PEEK, *J.*

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social tool. In terms of Soviet doctrine, belles-lettres become an adjunct to politics and pedagogy, a sugar coating on the pill of knowledge and morality." (Swayze, Political Control of Literature in the USSR, 1946-1959, p. 17 (1962).

APPENDIX B.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. California Penal Code, Sec. 311 provides:

> "As used in this chapter:
>
> "(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.
>
> "(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any status or other figure, or any recording, transcription or me-

chanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

"(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

"(d) 'Distribute' means to transfer possession of, whether with or without consideration.

"(e) 'Knowingly' means having knowledge that the matter is obscene."

4. California Penal Code, Sec. 311.2 provides:

"Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor." (Stats. 1961, c. 2147, p. 4427, 4428.)

APPENDIX C.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Jacob Zeitlin and Paul Ferguson, Plaintiffs and Appellants, vs. Roger Arnebergh, Defendant and Respondent. Civil No. 265 2.

Filed Dec. 18, 1962.

Appeal from a judgment of the Superior Court of Los Angeles County. Bayard Rhone, Judge.

Nathan L. Schoichet, A. L. Wirin and Fred Okrand for Appellants.

Brock & Fleishman and Stanley Fleishman as Amici Curiae for Appellants.

Roger Arnebergh, City Attorney; Philip E. Grey, Assistant City Attorney; and William E. Doran and Edward P. George, Deputy City Attorneys, for Respondent.

Plaintiffs sought a declaratory judgment that the sale, or offering for sale, of the book entitled "Tropic of Cancer" by Henry Miller is not violative of section 311.2 of the Penal Code.[1] A general demurrer to the complaint having been sustained without leave to amend, plaintiffs appeal from the ensuing judgment of dismissal.

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[1]Added in 1961, section 311.2 provides that, "Every person who knowingly: sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

The action is directed against the defendant as City Attorney of Los Angeles. Plaintiff Zeitlin conducts a general book selling business in Los Angeles; plaintiff Ferguson, an instructor of English at a local college, alleges that he desires to purchase the subject book but has been informed that it is unavailable for sale in the city of his residence (Los Angeles). According to plaintiffs' pleading, defendant caused a criminal complaint to be issued against one Bradley A. Smith, likewise engaged in the book selling business, charging the sale by him, of the subject book which assertedly was "obscene matter" and therefore contrary to the provisions of section 311.2.[2] Other allegations, unnecessary to set forth, declare that the official policy of the defendant is to prevent the further sale of the book in the City of Los Angeles. Accordingly, temporary injunctive relief is also sought. A copy of the book, marked as an exhibit, accompanied the plaintiffs' pleading. Also marked as exhibits, and attached to the complaint, are literary appraisals of the book and its author, book reviews and editorial comment, all tending to support plaintiffs' claim of non-obscenity.

It is agreed that the sole question for determination is whether "Tropic of Cancer" is "obscene" within the meaning of that term as defined in section 311(a) of the Penal Code. Added in 1961, section 311(a) reads

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[2]A criminal trial (to a jury) resulted in the conviction of Smith as charged. On October 24, 1962, the conviction was unanimously affirmed by the Appellate Department of the Superior Court (*People v. Smith*, Crim. A. No. 5113, ... Cal. App. 2d .....). Plaintiffs have pleaded the protection of the First and Fourteenth Amendments; since the constitutional applicability of the statute to the facts at bar is specifically in issue, plaintiffs are not without the remedy of declaratory relief despite the criminal appeal. (*Portnoy v. Superior Court*, 20 Cal. 2d 375.)

as follows: " 'Obscene' means that to the *average person, applying contemporary standards*, the *predominant* appeal of the matter, *taken as a whole, is to prurient interest*, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance." (Emphasis added.) Certain of the above language has been italicized because it corresponds, exactly or substantially, with the constitutional test for judging obscenity approved four years earlier in *Roth v. United States* (1957), 354 U.S. 476, 498[3]: ". . . [W]hether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole appeals to prurient interest." The above definition or test takes on added importance here in view of its approval by the California Supreme Court in *In re Harris* (1961), 56 Cal.2d 879 at 880: "The standard for judging obscenity adequate to withstand the charge of constitutional infirmity is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest." (*Citing Roth v. United States, supra.*)

"Preliminarily, one principle of law reannounced in the *Roth* case, is that "obscenity is not within the area of constitutionally protected speech or press." (354 U.S. 485.) The court reasoned, quoting (with emphasis

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[3]In the *Roth* case, *supra*, the defendant was convicted of violating the federal obscenity statute; in a companion case, *Alberts v. California*, the then California obscenity statute was involved. Both convictions were affirmed, the court holding that the statutes were neither vague nor violated the free speech guaranties of the First and Fourteenth Amendments.

added) from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 572, that lewd and obscene utterances "*are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*" (354 U.S. 485.) Other principles established by the *Roth* case are as follows: First, hard core, commercial pornography, described as "utterly without redeeming social importance" (345 U.S. 484-485) is not protected by the First Amendment;[4] second, "(T)he portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press" (354 U.S. 487-488); and third, material must be judged by its effect upon the "average person" and by whether the "dominant theme of the material as a whole appeals to prurient interest" which is defined (in a footnote) as "material having a tendency to excite lustful thoughts." (354 U.S. 488-489.) But since "(N)o issue [was] presented . . . concerning the obscenity of the material" (354 U.S. 481), the discussion of "obscenity" in *Roth* is highly theoretical—it has been observed that the *Roth* case and its companion case both reached the Court on a high level of abstraction and that the basic issues (before the Court) were whether the two statutes, on their face and in a vacuum, offended the constitutional guaranties there invoked

[4] It has been represented to us that the Solicitor General in his brief for the United States described hard core pornography as "erotic objects and books, pamphlets, photographs and motion pictures, depicting normal and abnormal sexual activity." Continuing, "No one would suggest" that such material had literary merit.

(43 Minn.L.Rev. 5, 25). In a three-judge dissent (*Attorney General v. Book Named "Tropic of Cancer"* (Mass.), 184 N.E. 2d 328), the *Roth* case was said to be "too dim a beacon by which to guess a course." (p. 335.) Here, however, the obscenity of the material is at issue; we cannot deal with it in the abstract as in a vacuum, but as printed and offered for sale to the public at large. We have read the book and we agree with one favorable reviewer that parts of it "will hammer away at some of the strongest of stomachs."

The book[5] relates the experiences of an American in Paris (where it was first published in 1934) after World War I. He has hopes of becoming a writer; usually lives as a down and outer who exists on the charity of his friends. In our opinion there is no connected plot. Sex episodes are described in minute detail. Of the book's 318 pages, there are sex episodes on 85 pages, some of which require two or more pages to describe (always with precise physical detail) and accompanied by four-letter words, which incidentally are sprinkled generously and at random throughout the balance of the book. Every form of sexual abnormality is mentioned or practiced.

According to certain persons recognized in their field, however, the book has literary merit. For example, says T. S. Eliot: "A very remarkable book, with passages of writing in it as good as any I have seen for a long time."

The statute, defendant argues, is not limited to hard core pornography; it also proscribes material which,

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[5]We use the word advisedly since the author himself (p. 2) writes: "This is not a book."

although possessing literary merit, is "utterly without redeeming social importance" when evaluated by the "average person applying contemporary standards." If the "average person," applying those standards, believes that the "dominant theme" of material "taken as a whole has an appeal to prurient interest," then the material is obscene. Plaintiffs' "average person," as indicated by the exhibits to their pleading, is a litterateur; but the standards of the litterateur are not necessarily those of the average person. In *Commonwealth v. Robin*, 30 U.S. Week 2551, the Pennsylvania Court of Common Pleas (holding the subject book to be obscene) treated this phase of the problem as follows: ". . . [w]e would consider that the average person might well be a composite of the jurors whom we have observed during our forty-five years at the bar and on the bench. Such a person is neither saint nor volitional sinner. He is not a literary critic nor a book burner. He is in fact an average person with average enthusiasms, average prejudices and with normal propensity for sexual activity (which happily, for the most part, is exercised in procreating the race) but who, if given sufficient erotic stimulus, may be distorted to engage in sexually abnormal or illegal behavior. This, then, is the average person to whom we apply the contemporary community standard."

In *People v. Smith, supra*, each juror who convicted the defendant as charged was presumably an average person. Plaintiffs refer to that proceeding in their briefs; without objection, therefore, we are directed to the transcript of testimony presented by the prosecution. The opinions of the book are not exclusively those of writers and book reviewers. Testifying that "Tropic

of Cancer" was utterly without redeeming social importance or had an appeal to prurient interest, were college presidents, superintendents of schools—active and retired, college professors, clergymen (Jewish and Protestant), psychiatrists, a penologist and a distributor of periodicals—one of the three largest in the country. This is a far more representative cross section of community thinking and community standards than that of a select, albeit competent, group of writers and reviewers. After all, the book is proposed to be sold not only to scholars and litterateurs, but to the general public.

There is a contrariety of opinion, of course, in this area of the law—specifically as applied to the subject book. We are advised that in addition to Pennsylvania, courts of first instance in Connecticut, New Hampshire and Wisconsin have determined that the book is not constitutionally protected by reason of its obscenity. An Illinois trial court in an unreported case (*Haiman v. Morris*) has held the book not to be obscene. On July 17, 1962, the Supreme Judicial Council of Massachusetts in *Attorney General v. Book Named "Tropic of Cancer," supra*, 184 N.E.2d 328, concluded that the novel was a conscious effort to create a work of literary art, possessed some social significance and was, therefore, not obscene under the principles discussed in *Roth v. United States, supra*. We are understandably told by plaintiffs that this case is persuasive authority for their position; but the majority of the Massachusetts court proceeded on the premise that competent literary critics constitute the "average person" mentioned in *Roth*. Thus, at page 334 it is said: "Competent critics assert, and we conclude, that Tropic has serious

purpose."[6] These critics, listed in a footnote, are all college professors. We have determined that such is not the test. The majority opinion also makes reference to four per curiam decisions following *Roth;* the opinion does not, as we read it, go so far as to conclude that these four decisions compelled the result there reached and now asked of us by plaintiffs in the present proceeding. A fair analysis of the majority opinion is that, enjoined by Justice Harlan in his separate opinion (*Roth v. United States, supra*) that the issue is not one of fact "but a question of constitutional *judgment* of the most sensitive . . . kind" (354 U.S. 497-498), the guaranties of the First Amendment were found to outweigh all other considerations.

Further proof of the contrariety of views above mentioned is the dissent in the same case (184 N.E.2d 328, 331-332). Three justices were of the opinion that the work "should be classified as pornography." They state at page 330: "The book is pitched at the nadir of scatology . . . Its detailed and sordid sex episodes, persistently inserted at intervals in what passes for narrative, leaves an outweighing staccato impression." The dissent also notes that *Manual Enterprises Inc. v. Day*, 82 S.Ct. 1432, one of the four per curiam decisions mentioned by the majority, is not a "brighter" beacon than *Roth* for determination of the problem before them. In light of the above discussion, therefore, much of the persuasive force of the Massachusetts case seems to have been dissipated. We are not obligated to follow the majority approach, nor do we do so.

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[6] "As was the case in *Roth*, however, the opinions in *Manual* raise as many questions as they answer." (McCloskey, *The Supreme Court 1961 Term* (1962) 76 Harv. L. Rev. 54, 125.)

The same is true of *People v. Richmond County News, Inc.*, 210 N.Y.S.2d 369, decided by the Court of Appeals, another tribunal for which we have the greatest respect. This, too, was a four to three decision. While not specifically concerned with "Tropic of Cancer," the decision turned on the principles discussed in *Roth v. United States, supra*. The majority, "[m]indful of the constitutional necessity to open the door barring state intrusion into this area only the slightest crack necessary (*Roth v. United States*, 354 U.S. 476, 488)", concluded that the prohibitions of the state obscenity statute "should apply only to what may properly be termed as 'hard-core pornography'" (p. 375). The dissent, in our opinion, expresses the sounder view (210 N.Y.S.2d 380-381): "By limiting the applicability of that section only to what may be termed 'hard-core pornography,' we would be adopting a far more stringent test than is required under present constitutional standards, and in effect be opening the door to obscenity so widely as to be tantamount to a repeal in large measure of section 1141. Since we may constitutionally give vitality to the legislative enactment, why is it necessary for us to strain against the definition laid down by the highest court in the land in order to permit the continued distribution of material which the average person would unhesitatingly condemn as obscene and lewd?

"There is a broad area between material which all would concede is shockingly and unquestionably obscene, and matter which all would agree is clearly free of obscenity. It is urged that the critical point in the compromise lies *between* these two extremes, and that, quoting Judge Cardozo (Paradoxes of Legal Science,

p. 37): 'All we can say, is that the line will be higher than the lowest level of moral principle and practice, and lower than the highest.'. Yet the determination is promptly made that the statute should apply only to the lowest level, namely, 'hard-core' pornography, despite Judge Cardozo's further statement: 'It [the law] will follow, or strive to follow, the principle and practice of the men and women of the community whom the social mind would rank as intelligent and virtuous' (id., p. 37).

"Courts may not abdicate their function of judging material between these two extremes by relegating it all to the area deemed free of obscenity. We do not hesitate to adjudicate similarly close and difficult situations in other branches of the law, such as e.g., determining what is fraud, reasonable doubt, premeditation and deliberation—the latter situations often involving human life itself. Or, as Judge Cardozo put it, 'jurisprudence has its reasonable man, its negligent man and . . . its moral man.' We cannot supply scientific definitions or require scientific tests in matters such as these, for law itself is by no means an exact science. 'They do better things with logarithms' (p. 1).

"Applying the test laid down in Roth v. United States, supra, 354 U.S. at page 487, 77 S.Ct. at page 1310, a test Judge Fuld agrees is within the constitutional 'boundaries of any permissible definition of obscenity,' all eight Judges below have concluded that the magazine 'Gent' is obscene under the statute, and their unanimous judgment, rendered in the exercise of their 'function as the spokesmen of the thought and sentiment of the community,' should not be lightly set aside (People v. Pesky, 254 N.Y. 373, 374, 173 N.E. 227; People

v. Osher, 285 N.Y. 793, 35 N.E. 2d 191; People v. Muller, 96 N.Y. 408, 410).

"The portrayal of sex in the manner presented here is 'without any redeeming social worth,' is not for the purpose of promoting art, literature or science, but is nothing more than a distribution of smut—dirt for dirt's sake—by a wholesale distributor to local stores and stands for the sole purpose of selfish commercial exploitation. Judges, who in their broad experience have necessarily had to deal with many sordid aspects of human life, are sometimes prone to forget that it is their duty to examine material of this kind through the eyes of 'the average person', whether youth or adult. It cannot be gainsaid—and we require no scientific tests to establish it—that the overwhelming mass of people in our State, by and for whom our public policy is made, are opposed to obscenity as finally defined by the Supreme Court in the Roth case (supra)."

The argument is also made that since the pertinent statute (Pen. Code, §311(a)) provides that the matter be "*utterly* without redeeming social importance" (emphasis added), it is constitutionally protected if any segment thereof has some redeeming quality. Because of the similarity of language found in the statute and the *Roth* definition of obscenity, we can properly assume that the legislation (enacted four years after *Roth*) was enacted with the *Roth* definition in mind. Reasonably construed, the word "utterly" means "predominantly" which is not contrary to one definition (cited by plaintiffs) in Webster's Third New International Dictionary, namely, "to an absolute or extreme degree." It is a rule of statutory interpretation that "the intention of the legislature controls if it can be

reasonably drawn from the language used, to the rejection of a more literal construction which would result in inconsistency or absurdity.'" (*People v. Hale*, 156 Cal.App.2d 478, 481.)

For the foregoing reasons, we hold that the subject book is obscene and therefore violative of section 311.2, Penal Code. Since plaintiffs do not contend that there is substantial ground to believe that their complaint can be amended so as to state a good cause of action, the trial court properly sustained the demurrer without leave to amend. (15 Cal.Jur.2d 163-164, §35.)

The judgment is affirmed.

LILLIE, *J.*

We concur:

WOOD, *P. J.*

FOURT, *J.*

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IN THE

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October Term, 1963
No. 584

ROGER ARNEBERGH,

Petitioner,

vs.

JACOB ZEITLIN and PAUL FERGUSON,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Motion for Leave to File Brief Amici Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, and California Citizens for Decent Literature, Inc., a California Corporation, in Support of Petitioner.

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Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with

law enforcement in the enforcement of the laws. California Citizens for Decent Literature, Inc., a California Corporation, operates as an affiliate of the national organization and is similarly dedicated.

The formulation of both organizations grew out of an impelling demand on the part of the larger segments of society, especially responsible fraternal, civic and religious organizations, which seek to bring under control the nationwide dissemination of obscene literature

At its recent national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity", through legal advocacy in the court-room in support of the people's case. Such action made possible, for the first time, the filing of the brief referred to herein.

On November 7, 1963, which was the earliest opportunity presented for effectuating this new policy, the undersigned, as counsel for *amici curiae* posted airmail letters to the counsel of record for the parties in the above-entitled cause, requesting written consent to the filing of a brief *amici curiae*. The undersigned was advised by telephone on November 13, 1963 that the consent of the petitioner herein was posted on November 12, 1963. In the same communication advice was received that respondents, by letter dated Nov. 11, 1963, have advised the clerk of the court that a reply brief would not be filed in the said cause. As of the date of preparation of this motion, no reply has been received from respondents, indicating whether or not their consent will be given.

Respondent's letter of Nov. 11, 1963 appears to function as an express waiver under Rule 24(3), 28 U. S. C. A., accelerating the time for the clerk's distribution of the petition, record and briefs to the court for its consideration. It therefore becomes advisable to file the within motion, pursuant to Rule 42(3), 28 U. S. C. A., in advance of respondent's reply to said request of *amici curiae* for consent to filing, so that such filing may not be considered tardy under Rule 42(1), 28 U. S. C. A.

Amici curiae propose to submit a comprehensive brief in support of the following reasons for granting the writ and raising the following questions, all of which were raised in the Court below in an amicus brief filed by California Citizens for Decent Literature, Inc.

A. The Supreme Court of the State of California has decided three federal questions of substance not theretofore determined by this Court:

(1) Whether the People have a federal constitutional right to a jury determination on the issue of "obscenity."

(2) Whether the determination of "obscenity" is primarily an issue of fact and whether the Court's review is limited to the question, "whether or not reasonable minds may differ that the material is obscene."

(3) Whether "Tropic of Cancer", as a matter of law, is without the area of protected speech and press as that line is drawn in *Roth v. United States* and *Alberts v. California*, 354 U. S. 476, 1 L. Ed. 2d 1498 (1957), whether that line be drawn at "obscenity" or "hard-core pornography."

B. The Supreme Court of the State of California has decided the following federal question of substance in a way not in accord with the applicable decisions of this Court:

(1) Whether freedom of speech and the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and as construed in *Roth v. United States* and *Alberts v. California (supra)*, and other decisions of this Court, limit the proscription of state obscenity laws to the suppression of "hard-core" pornography only.

The above referred to California Citizens for Decent Literature, Inc. amicus brief is on file with this Court as a part of the record in this case.

In light of the above, motion is therefore made for leave to file a brief amici curiae in support of the Petition for Writ of Certiorari in the above-entitled cause.

Respectfully submitted,

CHARLES H. KEATING, JR.,
JAMES J. CLANCY,
Counsel for Amici Curiae.

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Brief Amici Curiae of Citizens for Decent Literature, Inc., an Ohio Corporation, and California Citizens for Decent Literature, Inc., a California Corporation, in Support of Petitioner.

This brief is filed pursuant to Rule 42(1) of this Court.

Interest of Amici Curiae.

Citizens for Decent Literature, Inc., an Ohio corporation, with local affiliates throughout the United States, is a non-profit, non-sectarian, and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent, and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. California Citizens for Decent Literature, Inc., a California cor-

poration, operates as an affiliate of the national organization and is similarly dedicated.

The formulation of both organizations grew out of an impelling demand on the part of the larger segments of society, especially responsible fraternal, civic and religious organizations, which seek to bring under control the nationwide dissemination of obscene literature.

For convenience, *amici curiae* are also hereinafter referred to by the single, short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interests; that threatens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the courtroom advocating the overthrow of this "balancing of interests" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its recent national convention in Chicago during October of 1963, CDL adopted a policy aimed at giving increased support in the fight against "obscenity", through legal advocacy in the courtroom in support of the People's case. Such action made possible, for the first time, the filing of the brief submitted herewith.

Summary of Argument.

The Supreme Court of the State of California has decided three federal questions of substance not theretofore determined by this Court. Amici submit the following as the proper rules of law to be applied:

(1) The People have a federal constitutional right to a jury determination on the issue of "obscenity."

(2) The test to be applied by a reviewing court (constitutional) in a case where the People have not waived a trial by jury on the "obscenity" issue is "Whether reasonable minds might differ that the material is obscene."

(3) Tropic of Cancer, as a matter of law, is without the area of protected speech and press as that line is drawn in *Roth v. United States* and *Alberts v. California*, 354 U. S. 476, 1 L. Ed. 2d 1498 (1957).

Said Court has also decided a federal question of substance in a way not in accord with the applicable decisions of this Court. Amici submit the following as the correct statement of the law:

(1) Freedom of speech and the press, as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and as construed in *Roth v. United States* and *Alberts v. California* (*supra*), and other decisions of this Court do not limit the proscription of state obscenity laws to the suppression of "hard-core" pornography only.

ARGUMENT.

I.

The People Have a Federal Constitutional Right to a Jury Determination on the Issue of "Obscenity."

Although the matter in the court below is a civil action,[1] the decision rendered therein[2] collaterally attacks the criminal prosecution, *Bradley Reed Smith v. People of the State of California* (certiorari granted by this Court on April 29, 1963, October Term, No. 72), then in progress *in the same community* and involving the same book, Tropic of Cancer, and preempted the People of their constitutional right (both federal and state) to a jury trial therein.[4] It is inescapable that the decision is a direct attack on the Bradley Reed Smith *criminal* prosecution and a reversal of that jury's

[1] A complaint for declaratory relief.

[2] That the declaratory relief action was proper, that Tropic of Cancer was not violative of Penal Code Section 311.2, and enjoining the people from prosecuting persons for the sale of Tropic of Cancer.

[3] The People charged Bradley Reed Smith with a misdemeanor violation of California Penal Code Section 311.2 in that he did on or about October 9, 1961, in the City and *County of Los Angeles* knowingly exhibit and distribute "obscene material, to-wit: 'Tropic of Cancer,' by Henry Miller. He was duly arraigned and entered a plea of not guilty. The trial commenced on January 15, 1962, and after 27 trial days, the jury returned a verdict of guilty. (Resp. Br. filed in this Court in *Bradley Reed Smith v. Calif.*, pp. 2, 3.) Respondents commenced this action against the City Attorney of Los Angeles in the Superior Court of the *same* county (County of Los Angeles), *after* the Smith misdemeanor prosecution was filed and before the jury rendered its verdict.

[4] The People refused to join in the defendant's motion to waive trial by jury in the *Bradley Reed Smith* case. The People in California have a constitutional right to a jury trial in criminal cases. See Article I, Section 7 of the California Constitution and Judge Huls' opinion in the *Bradley Reed Smith* case. (Resp. Br. *Bradley Reed Smith v. Calif.*, Appendix A, p. 6.)

finding that Tropic of Cancer is obscene. Nor did the people waive their right to a jury trial in the *civil* action.[5] The petition for certiorari should be viewed in this light.

That the parties have a federal constitutional right to a jury trial on the issue of "obscenity" in a *criminal* obscenity case may have been decided by this Court in the *Roth* case.[6]

Justice Brennan made it clear in *Kingsley Book, Inc. v. Brown*, 360 U. S. 684, 1 L. Ed. 2d 1469, 1478, that he considered the right to a jury trial was a constitutional guarantee in *civil* cases also.[7]

Whether a book seller has a constitutional right to a jury trial on the issue of "obscenity" in *civil* actions is a question raised in an appeal now on file in this Court. (See Jurisdictional Statement, *A quantity of copies of Books, Harold Thompson and Robert Thompson, d/b/a*

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[5]Judge Rhode in the trial court sustained the *People's general demurrer* to the complaint for declaratory relief as did Justice Lillie, writing the opinion for a unanimous court in the District Court of Appeal, 211 A. C. A. 31, 27 Cal. Rptr. 320 at page 325.)

[6]Justice Brennan, speaking for the majority, cited with approval a jury instruction given in the *Roth* prosecution in the trial court, at page 1510, to the effect that "In this case, ladies and gentlemen of the jury, you and you alone are the *exclusive* judges of what the common conscience of the community is." (Our emphasis.) In the companion criminal case of *Alberts v. California*, both the People and the defendant had waived their right to trial by jury.

[7]In the *Kingsley* case, this Court in a five-to-four decision upheld a civil injunction brought by the State of New York and a finding by the trial court that the book "Nights of Horror" was obscene. Under New York equity practice, discretionary jury trials are provided for and advisory verdicts are to be followed or rejected by the trial judge as he deems proper. Justice Brennan based his dissent on the failure of the New York practice to require a jury trial, *although that issue was not before the court* (the defendant not having raised the issue).

P.K. News Service v. State of Kansas, in the Supreme Court of the United States, October Term, 1963, No. 449.)[8] Are the rights of the community to speak through a jury on "shame" any less than the rights of a book seller to the same determination on "candor?" (See the arguments *for* a jury trial in the Kansas Case Jurisdictional Statement, pp. 19-27.)

In the *Kingsley* case, Justice Brennan pointed out that the constitutional standard for obscenity, *by definition*, calls for a jury trial.[9] The California Supreme Court below thought otherwise.[10]

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[8]Kansas statutes provided for an *in rem* civil action against obscene publications. The Kansas Supreme Court in 379 P. 2d 254, affirmed a finding of the trial court that certain books carrying the inscription, "This is an original Nightstand Book," were obscene and a ruling that a jury trial was not required in a proceeding *in rem* of a civil nature. Is Counsel Stanley Fleishman positioned on the "Horns of a Dilemma?" Compare his arguments in the Kansas case with his arguments in *Bradley Reed Smith v. Calif. (supra)*. See also the "Motion to Dismiss" of the Kansas Attorney General at p. 14.

[9]At page 1478, "in *Alberts' v. California*, and *Roth v. United States*, decided today, 1 L. Ed. 2d 1498, the Court held to be constitutional the following standard for judging obscenity—whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole appeals to prurient interests. . . .

"The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, *by its definition*, calls for an appraisal of material according to the average person's *application* of contemporary community standards. . . ." (Our emphasis.).

[10]See opinion of California Supreme Court appearing at page 12 of Petition for Writ of Certiorari:

> "Finally, we do not believe that the definition of 'obscene' material as that which 'to the *average person* . . . predominant appeal . . . is to prurient interest. . . .' (Emphasis added) indicates that the ultimate determination of that question is always for the jury. These words fix a *standard* which is to be applied to the material; they

Historically the "constitutional standard" expressed by Justice Brennan in *Roth* had its genesis in an opinion written by Judge Learned Hand, *United States v. Kennerley*, 209 Fed. 119 (S. D. N. Y. 1913), often called the "architect" and "father" of modern obscenity law.[11] In that decision, Judge Learned Hand disapproved of the rule in *Regina v. Hicklin*, L. R. 3 Q. B. 36, and originated the rule that the determination on "obscenity" was a jury question, drawing an analogy to the standard of care in negligence cases, as a jury question.[12] Kennerley's general demurrer to a federal in-

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do not designate the body which is to apply the standard. The . . . language does not inherently predicate a question for the jury; it merely frames a definition. . . ." Compare this with Judge Learned Hand's opinion at note 14.

[11]Twenty-one years later in *United States v. One Book Entitled Ulysses by James Joyce*, 72 F. 2d 705 (1934), in a two-to-one decision in the Circuit Court of Appeals, Second Circuit, Judge Learned Hand joined with Judge Augustus Hand to establish "dominant effect" as one of the measuring sticks for obscenity in a case of major importance. The decisions in between *Kennerley* (1913) and *Roth* (1959) which used the "average man" and "predominant appeal" test cite Judge Learned Hand's early decision in *Kennerley*.

[12]At page 121.

". . . If there be no abstract definition such as I have suggested, should not the word 'obscene' be allowed to indicate the present, critical point in compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a *jury* should in each case establish the standard much as they do in cases of negligence. . . .

". . . Nor is it an objection, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. A *jury* is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctly from life and common speech." (Our emphasis.)

dictment for placing an obscene book in the mails raised the very legal question which was presented to the court below,[13] namely, what action may a court constitutionally take where no evidence of community standards is before it and where the People have neither had the opportunity to speak on the community standards nor indicated an intent to waive such right. Judge Hand, in overruling the demurrer and requiring Kennerley to stand trial, ruled that the "obscenity" issue was for the jury to decide.[14]

Judge Learned Hand, speaking for the Circuit Court of Appeal in *United States v. Levine* (1936), 83 F. 2d 156, 157, in a criminal prosecution for mailing obscene circulars, called the verdict on "obscenity" a "small bit of legislation *ad hoc*, like the standard of care" which the court imposes upon a jury as a "duty."[15] He

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[13]The book was made a part of the record by a Bill of Particulars and by stipulation. Kennerley's demurrer raised the question *before* the actual criminal trial as to whether the book was obscene.

[14]At page 120.

> "Whatever be the rule in England, in this country the *jury* must determine under instructions whether the book is obscene. The court's *only power* is to decide whether the book is so clearly innocent that the *jury* should not pass upon it at all. . . ." (Our emphasis.)

[15]The *Levine* case was cited in *Roth* at footnote 26 as consistent with the obscenity law expressed therein. Learned Hand said in *Levine* at page 157.

> "As so often happens, the problem is to find a passable compromise between opposing interests, whose relative importance, like that of all social or personal values, is incommensurable. *We impose such a duty upon a jury (Rosen v. United States, supra*, 161 U. S. 29, 42, 16 S. Ct. 434, 480, 40 L. Ed. 606), because the standard they fix is likely to be an acceptable mesne, and because in such matters a mesne most nearly satisfies the moral demands of a community. . . . . Thus, 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusions of a syllogism of which they are to find only the minor premise but really *a small bit of legislation ad hoc, like the standard of care.*" (Our emphasis.)

viewed the court's usurpation of this inherent right of the People as an evil. "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them which I assuredly do not: . . . ."[16] Judge Learned Hand gave insight to his decisions, which restricted the role played by the courts in measuring what is obscene. "It is often hard to secure unanimity about the borders of legislative power, but that is much easier than to decide how far a particular adjustment diverges from what the judges deem tolerable. On such issues experience has over and over again shown the difficulty of securing unanimity. This is disasterous because disunity cancels the impact of monolithic solidarity on which the authority of a bench of judges so largely depends. People become aware that the answer to the controversy is uncertain, even to those best qualified, and they feel free, unless especially docile, to ignore it if they are reasonably sure they will not be caught."[17]

While by the great weight of authority, due process in a constitutional sense (state and federal), does not require a trial by jury, the very nature of "obscenity" seems to demand it as an exception.[18]

In our system of justice the importance of a jury trial is derived from the basic fact that, in questions of fact, the people themselves are in a real sense the court of last resort. "The institution of the jury . . . places the real direction of society in the hands of the governed, or a portion of the governed, and not in that

[16]Hand, the Bill of Rights, Harvard University Press (1958), at page 73.

[17]*Id.* at p. 72.

[18]Obscenity being regarded as "ad hoc legislation."

of the government. . . . All the sovereigns who have chosen to govern by their own authority, and to direct society instead of obeying its directions, have destroyed or enfeebled the institution of the jury."[19]

At the inception of our Federal Constitution, obscenity law was sufficiently developed for it to be said that such utterances were outside the protection intended for free speech and press.[20] If, then, the waivering line between "free speech" and "obscenity" in any community at any given interval in our history is to be drawn by the measure of "candor" and "shame," it would seem that reason and precedent would require that the people themselves should draw it, in a jury trial.

II.

The Determination of Obscenity Is Primarily an Issue of Fact. Constitutional Review Is Limited to the Question "Whether Reasonable Minds Might Differ That the Material Is Obscene."

The constitutional inquiry should look only to the "reasonableness" of the factual determination, *i.e.*, "whether reasonable minds might differ that the material is obscene." Historically, was not the Seventh Amendment to the Federal Constitution adopted to preclude a Federal Court from re-examining facts which are tried by a jury in a state court?[21]

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[19] 1 De Tocqueville, Democracy in America 282.

[20] *Roth* decision, 354 U. S. at 483.

[21] "It is clear that the last clause of the seventh amendment, is not restricted in its application to suits at common law, tried before juries in the courts of the United States. It applies equally well to a case tried before a jury in a state court, and brought here by writ of error from the highest court of the state. *Chicago, B. & Q. R. Co. v. City of Chicago*," 166 U. S. 226, 240.

The lower court's determination that the issue of obscenity (Tropic of Cancer) is a matter of law for the court, mutilates the *Roth* decision and its significance. The pre-Roth precedence, and the *Roth* test by its very definition, pose a factual (jury) question.[22]

The vice in the lower court's opinion is that the California community may not now or in the future raise its standards above that to which it has been riveted by the California Supreme Court. Whereas the *Roth* decision contemplates a rule of proscription which is dependent upon present day standards,[23] nowhere in the court's decision below is there reference to this norm. For the rich and cherished pluralism in the American heritage, the court seems bent on substituting a monolith fashioned by Henry Miller and the "few".[24] Approval of such a "review" by this Court would effectively nullify the *Roth* test and the nation's obscenity laws.[25]

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[22] See text accompanying notes 9, 12 and 14. Compare *McCauley v. Tropic of Cancer*, 129 N. W. 2d 545, where, in reviewing a civil action in the nature of a declaratory judgment tried to a court, the majority opinion indicates in dictum that under the *Roth* decision the determination of a jury, within some limits, may be final.

[23] Judge Hand in *Kennerley* called it "the *present* critical point in the compromise between candor and shame at which the community *may have arrived here and now*."

[24] "To change standards of morals is the task of school and church; the task of the judge is to record the tides of public opinion, not to emulate King Canute in an effort to turn back the tide. My duty is to act as observer and recorder, not as regulator." *People v. Miller*, 279 N. Y. Supp. 583.

[25] This is rule by "Platonic Guardians." See text accompanying note 16.

> "Almost by definition, a man who is qualified to sit on the Supreme Court is not an average person. Not only by his formal training and experience is he separated from the average citizen in his mental and emotional maturity, but by long tradition and the time-demanding nature of his

By equating (we contend erroneously)[28] the *Roth* test to so-called "hard-core" pornography, the lower court in applying Penal Code Section 311.2 has arrived at an expanded rule of constitutional "review" which has no support in pre-Roth case law and little, if any, in the opinions of this modern court. Whether the court's "review" takes place before trial of the issue in a declaratory judgment civil action (as this case *would be* had not the criminal prosecution of Bradley Reed Smith been in progress), or in the "review" of a jury conviction after a criminal obscenity prosecution (as this case is, in reality), the scope of "review" should be the same; *i.e.* "whether reasonable minds might differ that the material is obscene."

Pre-Roth case law provides absolutely no support for the lower court's interpretation of expanded review. See here a host of cases to the contrary appearing in the extensive annotation following *United States v. Limehouse*, 285 U. S. 426 (decided April 11, 1932), entitled "Respective Functions of Court and Jury in Determining Criminality vel non of Matter." In *Ken-*

office he is removed from daily contact with a cross-section of average American communities."
Censorship: Government and Obscenity, by Terrence J. Murphy. There is a wide chasm between the court below and the standards of seven juries which have tried "Tropic of Cancer." See text following note 42.

[28]The *Roth* test is not limited to "hard-core" pornography. See Argument IV *infra*. The California Supreme Court does not claim that the statutory definition of "obscene matter" of Penal Code Section 311 includes any less material than *Roth*. "This language, indeed, *is* the language by Roth. . . ." (Our emphasis.) (Opinion, Petition for Writ of Certiorari, at p. 24.) This is not the view of Justice Fuld in *People v. Richmond County News*, 175 N. E. 2d 681 (concurred in by Justice Van Voorhis only) where he expresses the view that New York's statute, *independent of Roth*, excludes only "hard-core" material.

nerley (*supra*) Judge Hand said, "The court's *only power* is to decide whether the book is so clearly innocent that the jury should not pass upon it at all. *United States v. Clark* (D.C.), 38 Fed. 500; *United States v. Smith* (D.C.), 45 Fed. 478. The same question arises as would arise upon motion to direct a verdict at the close of the case. . . . The question here is, therefore, whether the jury might find the book obscene under proper instructions."[27] (Our emphasis.)

Did the majority in *Roth-Alberts* exercise a silent review of the material? Although legal writers and the court below claim to the contrary, pointing to the statement in the majority opinion at footnote 8 that "no issue is presented in either case concerning the obscenity of the material involved", the trustworthiness of this evaluation is not so evident.[28] It is difficult to imagine that the *Roth-Alberts* majority would shut their eyes to the subject matter therein concerned with, if such were not in their opinion factually outside the area of free speech and press.[29] Certainly Justices Harlan and Warren found the subject matter to be an issue and considered its nature in their opinion.[30]

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[27]200 Fed. Rptr. 119, 120.

[28]See Supreme Court Rule 10(2)(c), 28 U.S.C.A., which reads, "The statement (jurisdictional) of a question presented will be deemed to include *every subsidiary question fairly comprised therein*." The jurisdictional statement in *Alberts* challenged the California statute "as construed and *applied*." In his principal brief Alberts did contend the matter in the case was not "obscene." 45 Minn. L. R. 525.

[29]Do members of this Court "slide over" such important constitutional judgments where even slightly raised? See the opinion of Justice Brennan in *Manual Enterprises v. Day*, 8 L. Ed. 2d 639, at footnotes 4, 5; also in *Kingsley Book, Inc. v. Brown*, 1 L. Ed. 2d 1469, 1477.

[30]It might be inferred from Justice Harlan's statement that he regarded the majority as refusing to review the facts.

> "I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it a

Another view which is more respectful of the Court's guardianship of First Amendment rights is that the remaining five judges of the majority did first look at the material to make certain that "reasonable minds might differ that the material was obscene" and then, observing that the claim was not substantial, rendered their decision as though the issue were not raised; possibly for one of two reasons, so as not to place their imprimatur on the standards decided by those cases, or in deference to the fact finding function of the federal jury and state tribunal involved. If this is so, then the "hard-core" contrivance[31] had no basis at the very beginning, for those who have evaluated the material, seemed to be in agreement that the material was not "hard-core". In this light the so-called expanded constitutional review in the obscenity area is a "myth".

Justice Brennan, author of the majority opinion in *Roth* stated his view very clearly in *Kingsley Book, Inc. v. Brown*, 1 L. Ed. 2d 1469, that in reviewing the subject matter, the Court merely satisfied itself a jury question was present, *i.e.* that "reasonable men may differ whether the material is obscene".[32]

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jury or a judge, has labeled the question matter as 'obscene' for, if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind."

[31]See Argument IV.

[32]This seems to be the same test applied by Judge Learned Hand. See note 14. Justice Harlan alone of this present Court has voiced an inclination to learn beyond this. See Justice Stewart's opinion in *Volanski v. United States*, 246 F. 2d 842, 845. Even Justice Black in *Kingsley v. Regents of University of New York*, 360 U. S. 684, 689, voiced the opinion that if censorship was to be the rule, the United States Supreme Court is about the most inappropriate Supreme Board of Censors that could be found. . . ."

The lower court's support comes primarily from Justice Harlan's separate opinion in *Roth-Alberts* wherein he speaks of a "constitutional judgment of the most sensitive and delicate kind." Yet Justice Harlan's inclination to "review," provides weak support (because of his differing approaches to state and federal cases)[33] where the subject matter is Tropic of Cancer, called by the New York Court of Appeal "hard-core" pornography, and where the review involves a state case.

The court below cites the American Law Institute, Model Penal Code, tentative draft No. 6, Section 207.10 (1957) and its successor, Section 251.4(4) of the proposed official draft of the Model Penal Code (1962), as secondary support for the wide "review" exercised by the court. We submit that a historical review of the Model Penal Code development points to the contrary.

The majority of this Court approved the definition of "obscenity" which appeared in the 1957 draft[34] as being the equivalent of the definition given the jury in the *Roth* case, the Court approved definition in the *Alberts* case, the definition appearing in case law and Justice Brennan's Supreme Court Standard.[35] It is significant that among the reporter's notes to the 1957

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[33]Justice Harlan views the proscription of "hard-core" pornography to apply only to *federal* cases. *Roth v. United States (supra)*, at page 1517. Since Penal Code Section 311.2 codifies the *Roth* rule (see note 26) "hard-core" material is not *his* reference line for "review" in state cases.

[34]Section 207.10(2).

[35]1 L. Ed. 2d 1508, footnote 20.

"We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the American Law Institute, Model Penal Code, Section 207.10(2) (Tentative Draft No. 6, 1957)."

draft the following comment appears on the American Law Institute definition of obscenity:

> "13. *Obscenity As Fact or Law; Role of Court.* Whether material is 'obscene' is plainly one of those issues of mixed law and fact, usually submitted to the jury with instructions from the court as to applicable law, unless the judge withholds the case from the jury on the ground that the evidence could not support a conclusion of guilty. *Any tendency to stray from this line has been in the direction of authorizing the court, where there is no dispute as to the content of the material, to instruct the jury that it is obscene as a matter of law.* . . . Under our definition of obscenity a court could not instruct that a given writing is obscene as a matter of law, since elements other than the nature of the material itself enter into the determination, particularly the question of customary freedom of expression. Jury trial in this field has the merit of requiring unanimous condemnation by this sample of general population on issues which seem to be peculiarly within their competence: what is the predominant appeal of the material to the ordinary adult, and what are the outer limits of custom in description or representation of sexual matters. On the other hand, it has been suggested that a doubtful juror may hesitate to find something is not obscene lest he be thought perverse or licentious. In addition *it has been suggested that the issue of obscenity ought not to be trusted to a jury with the same breath of discretion as; for example, the issue of negligence*, because there is much greater

> agreement among ordinary people as to the care expected of a reasonable man than there is on the social, moral, and psychological problems involved in obscenity. Thus juries would be more likely to apply consistent standards in negligence cases than in obscenity prosecutions, where each jury must function as a 'tiny, autonomous legislature.'" (Emphasis ours.)

It was this condition which the drafters were trying to change when they drew up Section 207.10(3) of the 1957 draft. This proposal, however, was *rejected* by the Council of the American Law Institute.[36]

As reason for their proposal, the comment stated: "Bracketed Subsection (3), which was rejected by a narrow margin of votes in the Council of the Institute, would change prevailing law by giving judges a somewhat larger responsibility in deciding what is obscene, in order to meet criticisms relating to the operation of

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[36] See page 48 of the 1957 draft. The overwhelming body of authority is contrary to the position which the drafters were seeking to establish. (See text accompanying note 27.) It is reasonable to assume that the "silent revolution" against the existing standards in ruling case law, existed in that forum also. The same "rebels" were speaking. Justice Fuld of the New York Court of Appeals, who has played such a major role in this area (see note 26), was a member of the American Law Institute, Criminal Law Advisory Committee, as was also the late Judge Curtis Bok of the Pennsylvania Supreme Court. Judge Bok's mother was a member of the board of directors of the Curtis Publishing Co. (which owned 42½% of Bantam Books, Inc. stock) and the daughter of its founder. Judge Bok's brother was vice-president and director of the Curtis Publishing Co. The House of Representatives Report of the Select Committee on Current Pornographic Materials, Dec. 1952, comments at p. 7:

> "It is . . . reasonably possible that having been associated so closely with the publishing business that he became inherently imbued with a liberal conception of the tradition founded upon the constitutional provision guaranteeing the freedom of the press."

juries in this field, and to assure greater consistency on a statewide basis in application of the obscenity law."[37] The operation of juries in this area has not been criticized in ruling case law;[38] nor is consistency in jury verdicts essential.[39] A position contrary to the American Law Institute proposal was taken by the majority of this Court in *Roth* at footnote 30. "It is argued that because juries may reach different conclusions as to the same material, the statutes must be held to be insufficiently precise to satisfy due process requirements. But, it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system. Compare *Dunlop v. United States*, 165 U. S. 486, 499, 500, 41 L. Ed. 799, 803, 17 S. Ct. 375."

The successor to the lengthy pronouncement in Subsection (3) of Section 207.10 of the 1957 draft (rejected by the Council of the American Law Institute) now appears in a much diluted and revised form in Section 251.4(4) of the 1962 proposed official draft of the Model Penal Code. It is a simple statement, "The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene".[40] This dif-

[37] At page 48.

[38] We except from this statement the vociferous dissents of the absolutists, notably the late Judge Frank in the Lower Federal Court in *United States v. Roth*, 237 F. 2d 796, 822 (2d Circuit 1956), certiorari granted, 352 U. S. 964 (1957), and certain members of this Court.

[39] Our standards are mellowed in the progressive developments which flow from such multifarious determinations. These jury determinations are the test tubes in the development of our nation.

[40] This statement was only a small part of Section 207.10(3) as proposed. Section 207.10(3) was rejected in its entirety.

fers so radically from its corresponding statement in the 1957 draft. "The judge shall dismiss a prosecution for obscenity or acquit a defendant notwithstanding a verdict of guilty, if the judge is satisfied that the material is not obscene.", that, notwithstanding the 1962 comment which refers to the 1958 *per curiam* reversals[41], it is impossible to point to the 1962 proposed draft as authority for the radical "review" exercised by the lower court. The 1962 comment reads, "What we *preserve* . . . in the present draft is the independent judgment of the court on the question of obscenity without impairing the defendant's right to a jury trial." Does this mean to preserve that which exists in case law, or that which appeared as a part of the former rejected provision? If the latter, what significance can be laid to the failure to include that portion which reads, "*or acquit a defendant, notwithstanding a verdict of guilty.*"

Two other jury trials involving Tropic of Cancer should be cited for this Court's consideration on the issue of review of jury determinations: *People v. Cuffel*, ...involving a criminal trial and a jury conviction for the sale of Tropic of Cancer in Indianapolis, Indiana and *Grove Press v. Florida*, 156 So. 2d 537 (September 17, 1963), involving a civil injunction in which a jury found Tropic of Cancer to be obscene. The former is currently on appeal to the Indiana State Supreme Court after the jury conviction. In the latter case, the jury's finding that Tropic of Cancer was obscene was upheld by the District Court of Appeal of Florida (*supra*). From the opinion in the latter case,

[41] We contend the comment is based on a misconstruction of the 1958 per curiam reversals. See Argument IV.

it appears as though Grove Press, in disclaiming any challenge to the invalidity of the Florida statute as applied to Tropic of Cancer[42], may have conceded the "finality" of a *jury* finding on Tropic of Cancer.

It is significant to note that of the seven state juries which have considered Tropic of Cancer (of which amici have any knowledge), not one jury has supported it. In criminal trials, *People v. Fritch* (New York), *Yudkin v. Maryland* (Maryland), *People v. Cuffel* (Indiana), and *People v. Smith* (California), the jury found the defendant guilty of knowingly selling an obscene book. In a civil suit, *Grove Press v. Florida* (Florida), the jury found the book to be obscene. The closest the book has come to winning honors was in *People v. Pershina* (Marin County, California), in which the book seller was acquitted (reportedly on failure to prove "scienter") and in which it is also reported that the jury stood 11 to 1 that Tropic of Cancer was obscene. In *People v. McGilvery* (San Diego, California), also a criminal trial, it is understood that the defendant was similarly acquitted because of failure to prove "scienter."

To permit the "review" exercised by the court below to stand, in the face of this "jury box score," is to sterilize the *Roth* test and render the "community standard" gauge a vapid shibboleth.

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[42] At p. 538.

"In assignments of error and in its brief, in addition to contending the finding of obscenity was against the weight of the evidence, the appellant challenged the chancellor's ruling on the validity of the statute and contended the statute as applied to the publication was unconstitutional. But prior to argument, appellant withdrew its claim of invalidity and unconstitutionality of the statute. . . ."

III.

"Tropic of Cancer," as a Matter of Law, Is Without the Area of Protected Speech and Press as That Line Is Drawn in Roth-Alberts.

While a court may not decide that written matter is obscene, as a matter of law, if "reasonable minds may differ that the matter is obscene," the opposite is true if it can be said that reasonable minds would *not* differ that the matter is obscene. In the latter case, the Court can and should declare the matter obscene, as a matter of law. *Rosen v. United States*, 161 U. S. 606, 610 (dictum); *Saccaringen v. United States*, 161 U. S. 765, 766 (reversed on other grounds), see also text accompanying note 30. "Tropic of Cancer" is in this area. This result is the opposite side of the coin to the Court's power to declare the matter not obscene as a matter of law where "the matter is so clearly innocent, the jury should not pass on it at all."

It is submitted that the test for obscenity designated by *Roth* and applied in *Besig*, is a "'balancing" test—the degree of literary merit versus the social interest in order and morality; that is, whether the subject matter is "of such slight social value as a *step to truth* that any *benefit* that may be derived . . . . is *clearly outweighed* by the *social interest in order and morality*".[43] (Our emphasis.)

The court below, (Opinion, Petition for Certiorari, p. 14, n. 19) implies that Judge Stephens did not apply the *Roth* test in the 1953 "Tropic of Cancer" case, *Besig v. United States*, 208 F. 2d 142 (9th Cir. 1953). A close reading does not support this, nor does the

[43] *Roth v. United States*, 1 L. Ed. 2d 1498, 1507.

opinion of the court below suggest wherein the alleged infirmity lies. There is no question but that the dominant theme[44], the average person and the contemporary community standards tests[45] were applied in the *Besig* case. The "prurient interest" of Tropic of Cancer is admirably considered.[46]

It is submitted that the difference in interpretations of *Besig*, entertained by the court below and by amici herein, stems not from the *Hicklin-Roth* conflict but rather from the answer to the question as to whether the court below or Judge Stephens' court properly applied the *Roth* test. We submit, as held by Judge Stephens, that an author may not "eloquently" produce a book with an obscene central theme so that it will gain constitutional protection[47]—that "literary merit"

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[44] At page 146.
"We agree that the book as a book must be obscene to justify its libel and destruction, but neither the number of the 'objectionable' passages nor the proportion they bear to the whole book are controlling. . . . If . . . dirt appears as the primary purpose rather than the relation of a fact or adequate description of the incident, the book itself is obscene . . . we have adjudged each book as an integrated whole."

[45] At page 147, Judge Stephens quotes with approval Judge Learned Hand's famous statement of the average man in the community test. "We think Judge Learned Hand was in the best of his famous form in his happy use of words in U. S. v. Kinnerley." See note 12.

[46] At page 146.
"Applicant thinks our opinion is 'unclear as to whether the *test of obscenity is that it repeals or that it seduces*' . . . language can be so nasty as to repeal and of course to seduce as well. Appellant's argument tempts us to quote Pope's quatrain about the Monster Vice which, when too prevalent, is embraced. . . . 'Vice is a monster of so frightful mien As to be hated needed to be seen. Yet seen too oft, familiar with her face, We first endure, then pity, then embrace'. . . ." (Our emphasis.)

[47] At page 145.
"Nor do we understand that we have the legal power to hold that the statute authorizing the seizure of obscene

in the minds of a few, will not save work which is found by the community to be uncontestably beyond its acceptable standards.

If the interest of government in excluding "obscenity" is substantial (and it is assumed that the *Roth* case so instructs us), it is difficult to understand how such small significance can be accorded to the final judicial determination in *Besig* and to see it upset *as a matter of law*, and in disregard to the "climate" of the community as determined in the Bradley Reed Smith criminal trial.[48]

IV.

Freedom of Speech and the Press, as Guaranteed by the First and Fourteenth Amendment to the Constitution of the United States and as Construed in Roth v. United States and Alberts v. California (supra), and Other Decisions of This Court, Do Not Limit the Proscription of State Obscenity Laws to the Suppression of "Hard-Core" Pornography Only.

The *Roth* decision is clear that *obscene* material is not protected by the First Amendment. Nowhere is the word "hard-core" pornography referred to in the majority opinion.[49]

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books is inapplicable to books in which obscenity is an integral part of a literary work. So that obscenity, though a part of the composition of high literary merit, is not excepted from operation of the statute, whether written in the style of the realist, surrealist or plain shock writers."

[48]That there is error here as a matter of law is borne out by other jury verdicts. See text following note 42.

[49]Forgotten is the interpretation given Roth by the dissent of Justices Douglas and Black at page 1522. "It creates a regime wherein the battle between the literati and the Philistines, the Philistines are certain to win." The separate opinion of Justice Harlan referred to "hard-core" material, but only with

The concept that only "hard-core" material is prohibited, is a seduction espoused by the Kronhausens and certain commentators, with roots entangled in an erroneous interpretation of the 1958 *per curiam* "reversals"[30] of this court. Professors Lockhart and McClure write in 45 Minn. L. Rev. 35, "In three of the four cases, the Court must have made an *independent examination* of the materials and found that censorship of the materials violated constitutional requirements."

These three cases involved administrative prior restraint proceedings rather than criminal trials before the judiciary (*Roth-Alberts*) *Both* First Amendment *and Due Process issues* were involved, but the commentators saw no substantial issue other than the First Amendment issue (actual review of the subject matter involved). From this they deduced, at page 60, that this Court must have been thinking "abstractly" of "hard-core" pornography when it spoke of "obscenity" in Roth. They regarded the material as non-"hard-core", and the reversals on this ground.

Those decisions which have read the "hard-core pornography" concept into *Roth* have done so in reliance on this misguided interpretation. Notable here,

reference to the federal authority. If the Roth material was not "hard-core" as Justice Harlan so held, was not the affirmation of the Roth conviction a determination that "hard-core" was not the test, even in federal cases, where a jury was involved? (Roth was tried to a jury.)

[30]Certiorari was granted in four cases; *Times Film Corp. v. Chicago*, 355 U. S. 35 (movie, "The Game of Love"), One, *the Homosexual Magazine, Inc. v. Olesen*, 355 U. S. 371 (homosexual magazine), *Sunshine and Health and Sun Magazine v. Summerfield*, 355 U. S. 372 (nudist magazines), and *Mounce v. United States*, 355 U. S. 180 (nudist magazines, text in foreign language). The cases were summarily reversed without argument. See Supreme Court Practice, Stern and Gressman, sec. 5.12 at 180, 187 for factors to be considered in such cases.

is the opinion of Justice Desmond (concurred in by Justice Dye) in *People v. Richmond County News*, 175 N. E. 2d 681 (1961), a 4-3 decision involving the "girlie magazine." Chief Justice Desmond, influenced by the 1958 *per curiam* decisions, reluctantly held at page 688, "The inquiry for the court, therefore, is whether the publication is so entirely obscene as to amount to hard-core pornography . . . Virtuous adults will reject it (as all of us, Judges would *were we not restrained by the Roth-Alberts legal test*) . . .". (Our emphasis.) Had Justice Desmond not misconstrued the 1958 *per curiam* decisions, the dissenting opinion would have been the majority opinion (4-3 or 5-2) and the "hard-core" "myth" would never have gotten off the ground.

This infirmity in the source of the "hard-core concept" was recognized by the Court below in its opinion at footnote 23, where it says,

> "Each of these cases involves procedural problems which would justify the Court in refusing to consider the issue of obscenity.[21] The court's citation of Roth or Alberts, however, indicates that the reversals were on the obscenity issue. . . ". (Our emphasis.)

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[21] No administrative hearing was accorded in the *One* case. An administrative hearing was set in the *Sunshine and Health* case on the day the distributor filed his injunctive action in the Federal Court. In both cases, three years elapsed from the postmaster's refusal to deposit to the Supreme Court decision; nor did the federal government attempt to bring the matter before the federal courts in a criminal trial, where, in the words of Justice Warren, "It would be accorded all the protection of a criminal trial."

Presiding Judge Carrol in the trial court in *Penn v. Robin* and *Grove Press*, decided April 17, 1962,[52] rejects the analysis of these writers and the California Supreme Court and reaches a different result.

> "It must first be pointed out that in entering reversal in each of these cases the Court cited the Roth case in the Federal area and the Alberts case where state action was involved, and thus reaffirmed their reasoning in them. It is difficult to perceive how the Court's citation of the Roth-Alberts case can be construed as a dilution of their holding in that case. . . .
>
> It is to be noted that (in) each of these cases the initial order excluding the books from the mail was issued, *not after a finding by a court or a jury, but only upon the finding of the Postmaster General.* . . ." (Our emphasis)

Council for Amici made a similar observation about the same time, in a paper delivered to the League of California cities in San Diego on April 6, 1962, after *Marcus v. Kansas City Search Warrants*, 367 U. S. 717 (1961) was decided.[53] In that written opin-

[52]Judge Carrol's opinion appears at page 15 in Appendix A of People's (Respondent's) Brief filed in the District Court of Appeal and a part of the record in this case.

[53]At page 15.

> "Marcus v. Search Warrants' 6 L. Ed. 2, 1127 (decided June 19, 1961) suggests another explanation for the per curiam reversals. In my judgment, it is impossible to point to any of the four per curiam decisions as authority that the Supreme Court found the matter therein involved not to be obscene. Three of the four decisions dealt with administrative prior restraint and one dealt with judicial prior restraint. . . . None of the four dealt with a criminal prosecution. Although the 'scienter' issue of the criminal proceedings was thus removed, the more difficult 'prior restraint' issue more than compensated for its absence.

ion, involving a defective prior restraint operation, this Court reversed the judgment (but also refusing to decide whether the material was obscene) "in order to vindicate appellant's constitutional right." This and subsequent written decisions[34] in this Court reveal that "due process" is a *primary* consideration in the 1957-1963 cases.

Other cases indicate the *Lockhart* and *McClure* analysis is in error. Both writers regard the "girlie magazine" as not within the scope of "hard-core" material. Yet on October 23, 1961 in *Chobot v. Wisconsin*, 7 L. Ed. 2d 847, this Court refused to entertain an appeal from a court *criminal conviction* resulting from the sale of four girlie magazines of California manufacture. (Black, Douglas and Harlan noting probable jurisdiction.) Similarly on January 8, 1962, a petition for certiorari was denied in *Monfred v. Maryland*, 7 L. Ed. 2d 186, a *jury conviction* involving the sale of five girlie magazines of California manufacture. In both of these cases the issue was raised as to whether the material was entitled to constitutional protection.

It does not appear that the Manual Enterprises, Inc. case was reversed on the basis of subject matter, notwithstanding the grounds selected by Justice Harlan

As the finding of 'not guilty' in an obscenity prosecution cannot be allocated without poling the jury on the two separate issues of 'obscenity' and 'lewdly selling,' neither can the per curiam reversals be allocated without poling the United States Supreme Court on the two separate issues of 'obscenity' and 'prior restraint.' Neither Judge Carrol's opinion nor any similar comment was given wide circulation to conteract the bold statement of the commentators. This Court did not, however, continue the 1958 precedents (reversals without opinion)."

[34] *Manual Enterprises Inc. v. Day*, 370 U. S. 478 (1962), *Bantam Books Inc. v. Sullivan*, 372 U. S. 58 (1963).

in his opinion (concurred in by Justice Stewart), for in *Womack v. United States*, 294 F. 2d. 204, certiorari denied 5 L. Ed. 2d 822, a *jury conviction* for mailing similar photographs, intended for purchase by homosexuals, was denied review in this Court. Womack was the president of Manual Enterprises Inc. See reference to this in the *Manual Enterprise Inc.* case, 8 L. Ed. 2d 639 at 651, 669.

An analysis of the obscenity cases in this Court during the past five years, and the separate opinions therein, give no indication that this Court has departed from the obscenity test stated in *Roth-Alberts*. What is shown, however, is that where the People engage in a "prior restraint" operation in preference to a criminal prosecution, they do so at their peril. This Court has refused to assume the role of the "Platonic Guardian" denounced by Judge Hand.

Conclusion.

Judge Stephen's reference to Pope's quatrain on the monster Vice in the *Besig* case bears repeating here.

"Vice is a monster of so frightful mien,
As to be hated needed to be seen,
Yet seen too oft, familiar with her face,
We first endure, then pity, then embrace."

The petition for certiorari should be granted.

Respectfully submitted.

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